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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER OF
ELLA H. TINKOFF, Debtor.

ELLA H. TINKOFF, Debtor, and PAYSOFF TINKOFF, Claimant,
Appellants,

vs.

BEN GOLD, Trustee, LOUIS COHEN, Attorney for Trustee; DAVID STORAGE & MOVING COMPANY, a corporation, WAREHOUSEMAN; MARTIN WARD, Referee in Bankruptcy; SHIPMAN, EAMAN & MOYE Court Reporters; and A. J. MENDELSSOHN, Auctioneer,
Appellees.

No. 832

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

PAYSOFF TINKOFF,
6353 N. Clark St.,
Chicago, Illinois.
Hol. 5533.

UNITED STATES LAW PRINTING CO., PHONE LAKEVIEW 6581, CHICAGO, ILL.

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Appellees.

No.

PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction and Orders Appealed From.

This is an appeal from an order of the United States Circuit Court of Appeals for the Seventh Circuit, entered on June 8, 1946, which affirmed the judgment of the trial court, sitting in bankruptcy; and also from the further order denying the Petition for Rehearing, entered on August 12, 1946.

This Petition for Certiorari is filed with this Court pursuant to 28 U.S.C.A. 350, and is filed herewith in pursuance of the orders of this Court entered on November 9, 1946, extending the time to file the Petition for Certiorari to December 12, 1946; and the further order entered on December 6, 1946, extending the time to file the Petition for Certiorari to December 31, 1946.

II.

Grounds for Issuing Petition for Certiorari.

1. The Circuit Court of Appeals' decision in this case, 156 Fed. (2) 405 (Pp. 3 to 9, Sup. Rec.), is in direct conflict with the decision of the said Circuit Court of Appeals for the Seventh Circuit in the case of *In Re Peer Manor Building Corporation*, 153 Fed. (2) 802, which latter case holds that the jurisdiction of a Bankruptcy Court in a Real Property Arrangement under Chapter XII of the Bankruptcy Act, as amended, is exclusive and supersedes that of a State Court foreclosure proceeding, instituted *prior* to the bankruptcy proceeding.

2. The decision in this case, relying upon its opinion in *In Re Tinkoff*, 141 Fed. (2) 731, citing *Eyster* v. *Gaff*, 91 U. S. 521; 23 L. Ed. 403, holding that a State Court has concurrent jurisdiction with a Bankruptcy Court, is in direct conflict with the decisions of this Court in the case of *Isaacs* v. *Hobb Tie and Timber Company*, 282 U. S. 734; 51 S. Ct. 270; and *Wayne United Gas Company* v. *Owens-Illinois Glass Company*, 300 U. S. 131; 57 S. Ct. 384; and *Gross* v. *Irving Trust Company*, 289 U. S. 342; 53 S. Ct. 706, wherein the Bankruptcy Court's jurisdiction was held to be exclusive.

3. That the decision in the case of *In Re Ella H. Tinkoff*, 141 Fed. (2) 731, cited in the Court's decision, 156 Fed. (2) 405, is in direct conflict with the decisions of this Court, in holding (1) that a State Court has concurrent jurisdiction with a Bankruptcy Court in a foreclosure proceeding instituted prior to bankruptcy; and (2) that the said Circuit Court of Appeals had erroneously cited the case of *Eyster* v. *Gaff*, 91 U. S. 521; 23 L. Ed. 403, to support their proposition of law that a State Court has concurrent jurisdiction with a Federal Court in bankruptcy, relating to a proceeding instituted in a State Court *prior* to the institution of the bankruptcy proceeding; when the record in this case showed (a) that a Temporary Injunction had been issued in this proceeding, and further that (b) the State Court prior to the entry of the foreclosure decree, denied a motion to stay the foreclosure proceeding, pending the termination of the bankruptcy proceeding; and (c) that the Circuit Court further failed to apply the law in the case of *Murphy* v. *Hoffman*, 211 U. S. 562; 29 S. Ct. 154, 159, holding that the vacating of its injunction order by the Bankruptcy Court is not of itself a relinquishment of the "res", where exercise of such jurisdiction over the "res" is continued by the Bankruptcy Court.

4. That the decision of the Circuit Court of Appeals in *In Re Ella H. Tinkoff*, 156 Fed. (2) 405, is in direct conflict with the decisions of this Court, in holding that a Trustee in Bankruptcy and his Attorney, in a Chapter XII proceeding, for a Real Property Arrangement, (1) has jurisdiction to institute proceedings in the bankruptcy proceeding to oust the Bankruptcy Court of its jurisdiction; and further (2) that the expenses of the Bankruptcy Trustee and his Attorney in ousting the Bankruptcy Court of jurisdiction are a proper administrative expense of the Estate, to be paid by the Debtor.

5. That the decision of the Circuit Court of Appeals in the case of *In Re Ella H. Tinkoff*, 156 Fed. (2) 405, is in direct conflict with Section 432 of the Bankruptcy Act, wherein the Court holds, contrary to the Act, that the Referee may appoint a Trustee of the Debtor's property in a Chapter XII proceeding on his own motion, without the application of any party in interest therefor.

6. That the Circuit Court of Appeals in its opinion, *In Re Ella H. Tinkoff*, 156 Fed. (2) 405, in citing *In Re Tinkoff*, 123 Fed. (2) 528, holding that the warehouseman,—the David Storage and Moving Company—"had a *lien* on certain chattels stored with it by the debtor and claimant", made an arbitrary finding, which is not supported by the record or evidence in the record; in that (1) no evidence at any time was taken in the Bankruptcy Court, on Debtor's petition denying that the David Storage and Moving Company had a warehouseman's lien; and (2) neither was any evidence taken in the Bankruptcy Court, on any of the numerous petitions filed by the Debtor and Claimant from the time of the institution of the proceeding in July 1940 to date; and (3) that this Court should exercise its supervisory powers in correcting such flagrant errors of the Circuit Court of Appeals in making a finding of fact and law, when the same was not supported by the record, but was wholly outside of the record.

7. That the Circuit Court of Appeals has ignored the uncontradicted facts in this cause, as shown by the Record, and not denied by Appellees, which if reported in its opinion, would cause a reversal of the trial court's order, instead of an affirmance; and that this failure to report the facts by the Circuit Court of Appeals calls for the exercise of this Court's supervision by certiorari; said omitted facts, being in part, as follows:

(1) That no evidence was taken on Debtor's or Claimant's petitions from 1940 on;

(2) That the only evidence had in these proceedings were relating to the Trustee's petition to dismiss, and that the Trustee assumed this burden, instead of the secured creditors affected;

(3) That the Trustee was not legally appointed by the Referee, not being petitioned therefor by a party in interest;

(4) That hearings on Debtor's and Claimant's petition objecting to the appointment of the Trustee and his Attorney, due to their personal prejudice, were never held;

(5) That the Trustee, on July 16, 1940, when appointed, the day after institution of the proceedings, threatened the Debtor and Claimant "that he would see them (meaning the Debtor and Claimant) in their graves first, if they didn't go along with the Trustee," to show his personal bias and prejudice;

(6) That the Trustee and his Attorney prepared the order of July 17, 1940, vacating the restraining order of July 15, 1940, before they were formerly empowered to act,—the Trustee's bond being filed, subsequently, on July 18, 1940;

(7) That the *Trustee* at all times contended the personal property sold to be that of the *Debtor,* Ella H. Tinkoff;

(8) That the *Warehouseman* at all times contended that the personal property sold was that of the *Claimant,* Paysoff Tinkoff;

(9) That the Trustee acted only as a Depositary of the Auctioneer's funds of about $7,000.00; and his sole services in the Estate were to support his petition to dismiss, to oust the Bankruptcy Court, which appointed him, of jurisdiction, which burden was that of the Secured Creditors;

(10) That the Warehouseman had advertised this personal property for sale, at auction, on July 15, 1940, as that of Claimant, Paysoff Tinkoff;

(11) That the Trustee, on July 16, 1940, advertised this identical personal property as that of the *Debtor,* Ella H. Tinkoff, for sale on July 17 and 18, 1940, at public auction, before the Trustee's Bond was filed and approved, on July 18, 1940; which had been advertised by the Warehouseman, as that of Paysoff Tinkoff—Claimant above;

(12) That the Trustee, before the filing of his bond, on July 17, 1940, had the Court enter an *ex parte* order, on July 17, 1940, approving a contract between the Auctioneer, A. J. Mendelssohn, and the Warehouseman, David Storage and Moving Company, without notice, and without said contract or motion being filed; and allowing the Auctioneer to deduct his commissions per the private contract, instead of per Bankruptcy Rule XIV of the Supreme Court of the United States and per Rule 10 of the District Court (see Appendix of Rules);

(13) That the Trustee failed to have the Auctioneer file his Report of Sale pursuant to Rule 18 of the District Court, and further failed to have the Auctioneer account for the deduction of $1,837.75 from the sale of the said property, per Rule 45 of this Court;

(13) These facts, uncontradicted, if reported by the

Court in its opinion, would have been sufficient grounds to deny the Trustee and his Attorney any fees in this proceeding, since the Trustee and his Attorney were not impartial and unbiased in this entire proceeding, but were interested, biased and prejudiced, which would have legally prevented them from acting as impartial officers of the Court.

III.

Questions Presented.

1. Has a State Court, in a foreclosure proceeding, instituted prior to the bankruptcy proceeding, after the expiration of a restraining order issued by the Bankruptcy Court, which expired prior to the order of dismissal of the bankruptcy proceeding, and pending a motion to vacate the said order of dismissal in the bankruptcy proceeding, and also after denial of a motion in the State Court to stay the State Court proceedings pending the termination of the bankruptcy proceedings, jurisdiction to enter a foreclosure decree?

2. Has the State Court in a foreclosure proceeding, after a Stay Order is entered and issued by the Circuit Court of Appeals, pending an appeal in the bankruptcy proceeding, the right to enter an order confirming a Master's Report of Sale, within 20 minutes of the filing of the Federal Stay Order in the State Court, on the next day, after the issuance of the Certified Copy of the Stay Order, and after the parties and the Court have personal notice of the issuance of such Stay Order, and that a Certified Copy was then being obtained for filing in the State Court?

3. Has the Bankruptcy Court the power to authorize property to be sold as that of the Debtor, when a substan-

tial part of said property is claimed to be the property of a third person, without determining the actual property owned by the Debtor?

4. Has a Trustee, who is duly elected and appointed, the power to raise the issue, in a Bankruptcy proceeding, under Chap. XII of the Chandler Act, that the Court has no jurisdiction in the proceedings in which the Trustee was appointed; and charge his services and expenses, and that of his attorney, against the Debtor in said proceeding, seeking a Real Property Arrangement, as an Administrative expense?

5. Has the Referee the power to appoint a Trustee on his own motion, *ex parte* in a Chap. XII proceeding?

6. Has the Referee the power to approve the appointment of an attorney for a Trustee, on an *ex parte* petition, by a Trustee, in a Chap. XII proceedings?

7. Is the Debtor, or any party in interest, entitled to a hearing, after filing written objections to the said appointment of the Trustee and his attorney, before the said Referee?

8. Has the Referee, or the Bankruptcy Court, the power to approve any petitions for fees and expenses of the Trustees, or his attorney, after written objections are duly filed to the appointment of the said Trustee, and his attorney; and a hearing demanded, on said objections, which hearing was never granted?

9. Is a Trustee in Bankruptcy, an interested party under the Bankruptcy Act, capable to institute proceedings, or join in the institution of proceedings, to oust the Bank-

ruptcy Court in hearing the matter in which the Trustee was appointed, by contending that the Court had no jurisdiction; when said duty, if any, would fall upon the other parties in interest, whose rights were to be affected by the said proceedings?

10. Can the Debtor, or any party in interest, be deprived of his property without having a hearing, in a Bankruptcy proceeding under Chap. XII of the Chandler Act?

11. Can the Court, after making a finding that it has no jurisdiction, in a Real Property Arrangement proceeding, under Chap. XII, enter an order retaining jurisdiction over personal property, or the proceeds therefrom, and direct the Debtor to pay fees and expenses in administering the said Estate, without determining the issue as to the ownership of the property, which is partly claimed by a third person?

IV.

Questions presented on which no hearing was allowed.

This Court will observe that the record certified to this Court is voluminous, and also that the printed record is substantial, in raising the questions in this proceeding.

An examination of the said record will show that the Appellants herein, Ella H. Tinkoff, Debtor, and Paysoff Tinkoff, Claimant, have, from the institution of the said proceedings on July 15, 1940, endeavored to obtain a hearing in the Bankruptcy Court on the following questions presented to said Court, to wit:

1. Whether the Warehouseman, David Storage and Moving Company, had a valid lien?

2. Whether the Trustee was legally appointed?

3. Whether the attorney for the Trustee was legally appointed?

4. Whether the property in the possession of the David Storage and Moving Company was that of the Debtor, Ella H. Tinkoff, or that of the Claimant, Paysoff Tinkoff?

5, Whether the property of Paysoff Tinkoff, after a Reclamation Petition filed by Paysoff Tinkoff was subject to the jurisdiction of the Bankruptcy Court, in regard to which no hearing was had before the Court?

6. Whether the Income Tax Liens of the United States against Ella H. Tinkoff and Paysoff Tinkoff were prior and superior to the Warehouseman's Lien claimed by David Storage and Moving Company?

V.

Facts Giving Rise to Present Proceeding.

1. The facts show that prior to July 15, 1940 the David Storage and Moving Company, pursuant to a notice of publication (Exh. A (Appendix), were about to sell on July 15, 1940, the property in the possession of David Storage and Moving Company, as that of *Paysoff Tinkoff only,* and not that of Ella H. Tinkoff.

2. That to protect her said property about to be sold by the said Warehouseman, as the property of Paysoff Tinkoff, Ella H. Tinkoff, as Debtor, instituted this proceedings under Chapter XII of the Chandler Act, seeking a Real Property Arrangement, on July 15, 1940.

3. That the jurisdiction of the Debtor to institute a

Real Property Arrangement under Chapter XII of the Chandler Act as amended, was based upon the fact that the State Court, pending a prior bankruptcy proceeding under Section 74 of the Bankruptcy Act, instituted on November 15, 1935,—wherein the Debtor sought to extend the time to pay her debts,—entered orders while the bankruptcy proceeding was pending, after a temporary injunction and restraining order had been issued, and also after denying motions to stay the State Court proceedings, pending the bankruptcy proceedings.

The facts upon which same were based may be summarized as follows:

(A)

Filing of Present Petition Under Chapter XII of the Chandler Act.

1. That Ella H. Tinkoff, Debtor, filed her petition for a Real Property Rearrangement on July 15, 1940, in the United States District Court, for the Northern District of Illinois, Eastern Division, as No. 73,451, and the properties involved were (a) the Hamm Property, (b) the Mallers Property, and (c) Unimproved Property.

(B)

Filing of Previous Petition, Under Section 74 of the Bankruptcy Act, as Amended.

1. The Debtor, Ella H. Tinkoff, did on November 15, 1935, file her petition under Section 74 of the Bankruptcy Act, as amended, to extend the time to pay her debts, and in such petition scheduled (a) the Hamm Property, (b) the Mallers Property, and (c) the Unimproved Property, the same and identical properties as that scheduled in her Pe-

tition under Chapter XII of the Chandler Act, as amended; and that said petition was filed in the United States District Court, for the Northern District of Illinois, Eastern Division, as No. 64916.

2. That a Stay Order was entered on November 18, 1935, by the District Court, staying all State Court proceedings to December 9, 1935; and that a motion for a further stay order was made on December 10, 1935, which the Court referred to the Referee, sitting as a Master; and under date of January 17, 1936 the Master recommended the dismissal of the Debtor's petition under Section 74; and having taken the motion of December 10, 1935 for a further stay under advisement, failed to act upon the same on January 17, 1936.

3. That the District Court did on January 20, 1936, enter an order dismissing the said petition under Section 74, aforementioned.

4. That on January 22, 1936 said Petitioner filed her petition to vacate the order of dismissal of January 20, 1936, which petition was denied on February 5, 1936.

5. That on February 21, 1936 said Debtor, Ella H. Tinkoff, did perfect and file her appeal in the Circuit Court of Appeals as No. 5778.

6. That on March 6, 1936 the Circuit Court of Appeals entered a stay order, staying all further proceedings in the case of Chicago Title & Trust Company, Trustee, *v.* Ella H. Tinkoff, No. 34 S 8978, in the Superior Court of Cook County, for one week, or until the further order of the Court.

7. That said Circuit Court of Appeals did, on July 16, 1936, affirm the order of the Trial Court dismissing the appeal, and did on October 1, 1936 deny a petition for rehearing.

8. That the said Debtor, Ella H. Tinkoff, did file her Petition for a Writ of Certiorari with the Supreme Court of the United States, which petition was denied on January 4, 1937, and that a petition for rehearing was denied subsequently by the Supreme Court of the United States.

(C)

State Foreclosure Proceedings Re: The Mallers Property.

1. That on June 22, 1934 the Chicago Title & Trust Company, as Trustee of the Mallers property, instituted State foreclosure proceedings in the Superior Court of Cook County, State of Illinois, entitled "Chicago Title & Trust Company, *et al.*, *vs.* Ella H. Tinkoff, *et al.*, No. 34 S 8978", and that the matter, on November 15, 1935, was being heard by a Master, and no final decree entered therein at the time of the institution of the bankruptcy proceeding by said Ella H. Tinkoff on November 15, 1935, under Section 74 of the Bankruptcy Act, to extend the time to pay her debts; and said State Court proceedings were restrained by the Bankruptcy Stay Order of November 18, 1935.

2. That said Chicago Title & Trust Company immediately after the order of dismissal in the Bankruptcy Court, on January 20, 1936, did on January 21, 1936 serve a notice that it would continue the State Court proceedings in Cause No. 34 S 8978, and move for an order approving the Master's Report, and enter a decree in favor of the plaintiff therein on January 22, 1936.

3. That the Appellant, Ella H. Tinkoff, did also on January 21, 1936 serve notice that motion would be made on January 22, 1936 to vacate the order of dismissal in the Bankruptcy case, No. 61946, and continue the restraining order; which motions the Bankruptcy Court took under advisement, and denied on February 5, 1936.

4. That said Ella H. Tinkoff and Paysoff Tinkoff, as Defendants in Cause No. 34 S 8978, did, on January 28, 1936, *prior* to the entry by the State Court of a decree of sale on January 28, 1936, move and petition the State Court to stay and continue the State Court proceedings, due to the pendency of the bankruptcy proceedings, which motion the State Court did then and there deny, on the ground that the Bankruptcy Court had no jurisdiction over said property; and that said State Court after entering the order denying a stay due to bankruptcy proceedings pending, did then and there enter the decree of sale on January 28, 1936.

5. That the Circuit Court of Appeals, on March 6, 1936, entered a stay order of the State Court proceedings, and that the State Court itself, and the Chicago Title & Trust Company, and its attorneys, with full knowledge and notice of the issuance of said stay order, and in violation thereof, did on March 7, 1936, after the issuance of such stay order by the Circuit Court of Appeals, enter an order confirming the Master's Report of Sale and Distribution of March 3, 1936, based on a Notice of Motion only, without service of any Petition or Motion, and without granting Appellants an opportunity to be heard in the State Court.

6. That the said State Court and the Plaintiff in said State Court proceeding, did further on November 20, 1936, in violation of a further stay order of the Circuit Court

of Appeals, while said appeal was pending in said Appellate Court, enter an order appointing a Receiver of the Debtor's property; and which order of November 20, 1936 was later vacated on November 23, 1936; and that this last order of November 23, 1936,—long after the 30 day expiration to amend the order, to-wit, on May 17, 1937,—was vacated and set aside by the State Court, without any notation or memorandum of the State Court, to warrant, the changing of said order of November 23, 1936, after the 30 day period.

(D)

State Foreclosure Proceedings Re: The Hamm Property.

1. That the "Continental Illinois National Bank & Trust Company, as Trustee" for the Hamm property, brought a *strict foreclosure* suit against the Appellants, Ella H. Tinkoff and Paysoff Tinkoff, her husband, and others, on July 30, 1935, as Cause No. 35 S 11323, to foreclose the Hamm property in the State Court of Illinois.

2. That service of summons was endeavored to be made on the Defendant, Paysoff Tinkoff, at Leavenworth, Kansas, where said Paysoff Tinkoff was then residing, and that the Affidavit of Service was not exemplified, as required by Illinois law (Chap. 101, Sec. 6, 1935 Ed. Ill. Stat. Rev.), when a service is made out of the State of Illinois.

3. That personal service was endeavored to be made upon Appellant Ella H. Tinkoff, while she also was at Leavenworth, Kansas, by leaving same with a person, at Debtor's residence, at Chicago, Illinois, who was contended to be a member of the Appellant's family; that Petitioners filed a petition to quash such service, and same was denied by the State Court on January 26, 1937.

4. That Appellants further endeavored to stay the State Court proceedings herein, pending the Bankruptcy proceedings, by a petition duly filed on September 5, 1936, in the State Court, and same was also denied.

5. That pursuant to Subdivision (8) of Sec. 50 of the Civil Practice Act (Chap. 110, Sec. 174, Ill. Rev. Stat. 1941 Ed. Defendants were allowed the period of one year to file a petition to vacate a default decree in a strict foreclosure proceeding, *where no personal service was made in the State,* so as to allow Defendants in said foreclosure proceeding to redeem the property; and that pursuant thereto Appellants filed their petition within one year from the date of the default decree on February 4, 1936, to-wit, on February 4, 1937, and that an order was entered by the State Court allowing the petition to vacate to be filed, and to be called upon notice to either party, and that said petition to vacate is pending in the State Court.

6. That on November 15, 1935, when the Debtor filed her Petition in Bankruptcy to extend the time to pay her debts under Sec. 74 aforementioned, in Cause No. 61946 in which the Debtor scheduled the Hamm property, no final decree was entered in Cause No. 35 S 11325.

7. That the default decree was entered by the State Court in Cause No. 35 S 11323 on February 4, 1936, one day before February 5, 1936, when the Bankruptcy Court denied Debtor's motion to vacate the order of dismissal entered on January 20, 1936.

VI.

The Trustee, Instead of the Secured Creditors In this Proceeding, Assumed the Burden to Show that the State Court Decrees were valid, and that the Bankruptcy Court Therefore Lacked Jurisdiction of the Debtor's Real Property Arrangement under Chapter XII of the Chandler Act; and the Trustee's and his Attorney's Fees were Charged as an Administrative Expense Against the Personal Property of the Debtor and Claimant, Sold at Auction.

1. That the hearings,—from July 15, 1940, the date of the institution of this proceedings, until June 13, 1945, when the final order was entered in this proceedings—were solely based upon the Trustee's Motion to Dismiss these proceedings, on the ground that the Bankruptcy Court had no jurisdiction, because the Debtor had no real estate to re-arrange; the Trustee contending that the orders entered in the State Court proceedings in 1936 were valid, and ousted the Bankruptcy Court of its jurisdiction in this proceeding.

2. That the secured creditors who had originally instituted these proceedings,—to-wit, The Chicago Title & Trust Company, as Trustee, relating to the Mallers property, in cause No. 34-S-8978, and The Continental Illinois National Bank and Trust Company, as Trustee, in cause No. 35-S-11323,—did not contest these Bankruptcy proceedings, although their rights were affected; but this burden was solely assumed by the Trustee, and for whose legal services the Court compelled the Debtor and Claimant to pay the Trustee's Attorney, the amount of $1,500.00,—to contest their right to have a hearing in the Bankruptcy Court in this proceeding under Chapter XII of the Chandler Act.

3. That this cause was originally dismissed by the Referee on February 26, 1941, and that the Bankruptcy Court, on Debtor's and Claimant's, Petition for Review, set aside the said order of dismissal on September 8, 1941, without prejudice, for a rehearing; and that the Trustee and his Attorney are charging for their services, in being unsuccessful in dismissing this proceeding, from July 16, 1940 to September 8, 1941.

4. That subsequent thereto the Trustee and his Attorney renewed their Motion to Dismiss on the same grounds, which Order of Dismissal was subsequently entered on December 3, 1942, and affirmed by the Bankruptcy Court on January 25, 1943 (R. 220).

5. That the Trustee violated his duty as an Officer of the Court, to be impartial and disinterested, and assumed the burden of a party in interest, to-wit, that which is placed upon the secured creditors, and that the said Trustee was therefore not entitled to any fees from the estate of the Debtor; and that the action of the Court in allowing said fees to the said Trustee and his Attorney was, in substance and in fact, compelling the Debtor and Claimant to pay the Trustee and his Attorney, for contesting the rights of the Debtor and Claimant to have a hearing in the Bankruptcy Court; in other words, paying the said Officers of the Court to deprive the Appellants of those very rights they were seeking to obtain from the Bankruptcy Court.

6. That the Trustee actively participated in three appeals in this proceedings to the Circuit Court of Appeals, reported in (1) *In Re Ella Tinkoff, Debtor,* 123 Fed. (2) 528; (2) 141 Fed. (2) 731; and (3) 156 Fed. (2) 405; and also in the proceedings in this Court, on the ground that the Trustee and his Attorney at all times contended it was their duty to show the Courts that the Bankruptcy Court had no

jurisdiction in this proceedings, and that fees for their services to oust the Bankruptcy Court of its jurisdiction should be charged against the *res.*

7. That the personal property of the Debtor and Claimant, having a value of $90,000, was sold at auction for about $7,000, and was in the possession of the Bankruptcy Court, the *title* to which has never been determined; the *Trustee* at all times contended that the property sold was that of the Debtor, *Ella H. Tinkoff;* and the *Warehouseman* at all times contended that the property sold was that of the Claimant, *Paysoff Tinkoff;* and that no hearing was had by the Court to determine Claimant's right to the property, separate and distinct from Debtors.

VII.

The Trustee Assumed the Further Duties of the Warehouseman, to Show that the Warehouseman's Lien Was Valid, and that the Debtor's Restraining Order Should Be Vacated; and Further Supervised the Auction Sale, and Objected to any Hearings of Debtor's and Claimant's Petitions until his Petition to Dismiss had been Disposed of: and successfully objected the Auctioneer making a Report of the Sale, or Account for the $1,837.75 Auctioneer's Fees of a Gross Sale of $6,969.05, per the Bankruptcy Rules. ....

1. That a temporary restraining order was issued on said date (July 15, 1940), and that immediately thereafter, on July 16, 1940, a motion to vacate the said order was filed by David Storage and Moving Company and Albert J. Mendelssohn,, Auctioneer, jointly, who sought the following relief of vacating the restraining order, and to return the property to the custody of the respondents, in the following prayer, to-wit:

> "Wherefore respondents move that this Honorable Court vacate the order of July 15, 1940, that said David

Storage and Moving Company and said Albert J. Mendelssohn be enjoined and restrained from interfering directly or indirectly with the custody and possession of the property of said Ella H. Tinkoff, debtor herein, and that this honorable court return the said property to the custody of said respondents.

Robert Mack David
Robert Mack David
Attorney for David Storage and
Moving Company.
Spitz & Adcock
Spitz & Adcock
Attorneys for Albert J. Mendelssohn."

2. That on the same day, July 16, 1940, without any notice, the Court on its own motion appointed Ben Gold as Trustee, fixing his bond at $5,000.00 (R. 15, 16), and that the said Ben Gold, prior to filing his bond, on July 18, 1940, inserted a publication of the sale of the said property as the Debtor's property on July 16, 1940, in the Chicago Daily News, same being in words and figures as follows:

NOTICE INSERTED IN THE CHICAGO DAILY NEWS ON JULY 16, 1940, BY BEN GOLD, TRUSTEE, OF THE PROPERTY OF *ELLA H. TINKOFF* (2 in. x 1½.).

Auction Auction

Wednesday and Thursday
July 17 and 18
At 2 and 8 P.M.
By Order of
The United States District Court
For the Northern District of Illinois
Eastern Division
Number 73451
In the Matter of Ella H. Tinkoff

41 Oriental Rugs, 24 Sectional Bookcases,
30 Barrels of Bric-a-brac and Art objects,
3 Van loads of Furniture
Ben Gold, Trustee
39 S. LaSalle St.
Albert J. Menedelssohn
Auction Rooms
423 S. Wabash Ave.

setting sale for 2 2P.M. on July 17, 1940, without notice to the Creditors or other parties in interest.

3. That the said Louis Cohen, attorney for the Trustee, *prior* to the approval of his appointment by the Court on July 17, 1940, entered into the proceedings, examined the Debtor under oath in open court, had the Court exclude Paysoff Tinkoff, husband, from the Court-room, and contended that the Court had no jurisdiction to hear this cause, and assisted in preparing the order vacating the said injunction aforementioned, and entered the order vacating the injunction on July 17, 1940 (R. 16, 17), on a motion *not made or presented to the Court,* to-wit, the motion of Albert J. Mendelssohn, as the Auctioneer, for authority to proceed with the sale of the property and assets claimed by the Debtor, *pursuant to an agreement theretofore entered into by and between David Storage and Moving Company and Albert J. Mendelssohn,* and *not made a part of this Record, at any time,* by the Trustee.

4. That the Trustee's bond was not approved until July 18, 1940 (R. 25, 26), and that the said property was purported to be sold *prior* to the approval of the Trustee's bond; and the attorney for the trustee was appointed on July 17, 1940, also prior to the approval of the Trustee's Bond.

5. That the said Court on July 16, 1940, in appointing

the said Trustee *ex parte,* authorized the Trustee to sell the Debtor's goods at any time in his discretion; and that on the next day, at 10 A.M. July 17, 1940, the Debtor filed her petition to vacate this order entered by the Court *ex parte,* authorizing the Trustee to sell the property, as that of the Debtor, in his discretion; and that the Trustee aforementioned noticed the same for sale, at 2 P.M. July 17, 1940, through a publication in the Chicago Daily News on July 16, 1940.

6. That the said Referee refused to act on the said petition to vacate, and continued the same, and in fact refused, as hereinafter mentioned, to act on any further petitions or motions presented by the Debtor and Paysoff Tinkoff, Claimant, *until the question of jurisdiction, which was raised by the Trustee's attorney prior to his appointment on July* 17, 1940, *was disposed of;* and that the said Trustee from the time of his appointment, without any investigation, at all times, contended that the Bankruptcy Court had no jurisdiction, and that the proceedings were not filed in good faith.

7. That the said Louis Cohen, attorney for the Trustee, during the said hearing on July 17, 1940, stated to the Appellants, Ella H. Tinkoff, Debtor, and Paysoff Tinkoff, Claimant, in substance, *that if the Appellants did not go along with the Trustee, Ben Gold, in this proceedings,* that *he, Louis Cohen, the attorney, would see the Appellants in their graves first,* and that this matter was immediately presented to the Referee and the Court in a petition filed against the Trustee and his attorney to show their bias.

8. The record further shows that the Referee continued all of the Appellants' motions, refused to act upon the same, denied Appellants a hearing, and refused to certify any petitions for review to the Bankruptcy Court.

9. That the said David Storage and Moving Company at all times contended that the property sold was the sale of the *property of Paysoff Tinkoff,* and not Ella H. Tinkoff, when it said on page 95 of the Record in a petition filed on August 30, 1940 to dismiss the Debtor's petition to withdraw funds to avoid an eviction, in part,

> "That *your petitioner and other claimants contend that all of the said property was owned by Paysoff Tinkoff. The Debtor is not entitled to exemption of property which did not and does not belong to her.*"

And on May 14, 1941 the said David Storage and Moving Company alleged in their petition for a turn-over order, as follows:

> "On the 15th day of July, 1940 your petitioner was about to sell at public auction certain household goods and other chattels in their possession, which were previously deposited with your petitioner *by Paysoff Tinkoff.*"

10. That the Trustee contended that the property sold was the *property of Ella H. Tinkoff,* and not Paysoff Tinkoff, when he said on January 24, 1941, in his answer (R. 131)—to the Petition of Paysoff Tinkoff (R. 127) for an advance of $300.00 to avoid eviction, said Paysoff Tinkoff claiming that the Trustee had in excess of $10,000 of the property of Paysoff Tinkoff, per his reclamation petition filed on July 18, 1940 (R. 30), as follows, in part:

> "Your respondent * * * avers that he is without knowledge concerning the ownership of any property by said petitioner * * * and again admits that the *proceeds of the sale of certain property sold as the property of Ella H. Tinkoff, less certain deductions, is now in the custody of the respondent, as trustee.*"

11. That nowhere does the record show, as stated in the order of July 17, 1940 (R. 15, 16),—prepared by the

Trustee's attorney, Louis Cohen, prior to his appointment, —that a motion was made by Albert J. Mendelssohn to vacate the restraining order and proceed with his auction sale, pursuant to a *private agreement* entered into between David Storage and Moving Company and the said Albert J. Mendelssohn, on June 6, 1940, and June 27, 1940 (R. 81-85).

12. That the record is replete with petitions, demands and motions on the part of the Appellants from July 23, 1940, to compel the said Auctioneer, Albert J. Mendelssohn, to file with the Court the *private* contract referred to (R. 81-85) in the said order aforementioned, and also his *report of sale,* and that the said private contract was not filed with the Court until an order was entered at the insistence of the Appellants, *and not the Trustee,* that the said Albert J. Mendelssohn would be held in contempt of Court if the said contract was not filed; and that at no time did the Auctioneer file his Report of Sale.

13. That at no time, from an examination of the records, is it shown that the said *Trustee did any act in this proceeding other than to contest and object to the motions of the Appellants to oust the Court of its jurisdiction,* and *to prevent the Court from granting any hearings in this matter until the question of jurisdiction had been determined* and all the rights of the Appellants and their property have been impaired and lost, by the failure to have a hearing thereon.

14. That the Trustee in his Answer, filed on Oct. 18, 1941, to the Appellants' Petition to have a hearing on the 29 pending motions (R. 209-215), prays that the hearing on the pending motions be postponed until the determination of the Petition to Dismiss, said, in part, as follows: (R. 215)

"and your Trustee urges that before any relief is

granted with respect to the motions presented by the debtor and Paysoff Tinkoff, *that the said issue relating to the dismissal of the debtor's petition herein be heard and determined; that all orders entered with reference to the subject matter of said motions and petitions would be of no effect if ultimately the petition of the debtor herein is dismissed.*

"Wherefore, your respondent moves that all motions of the said debtor and Paysoff Tinkoff, hereinabove referred to in this answer, be postponed until after the determination of the petition for dismissal of debtor's petition and answers thereto.

"And your respondent will ever pray.

Ben Gold, Trustee,
By Louis Cohen
His Attorney"

15. The Trustee admits that not one cent has been brought into the Estate by his or his attorney's efforts, and his reports show that the only act done by him in preserving the Estate, and collecting and liquidating the same, was in disposing of the net proceeds received by the Trustee from the auctioneer, and that the Trustee at no time tried to compel the said David Storage and Moving Company and the Auctioneer to account to the Court as to withholding practically $1,837.75 from the proceeds of the sale without any accounting, including therein $530.00 as fees for the attorneys of the Auctioneer, Spitz & Adcock, received by them for doing two (2) days work in vacating the restraining order, which work the Trustee admits was done by him.

16. That the Auctioneer gave the Trustee a report of his sale, which the Trustee *never filed with the Court, or forced the Auctioneer to file with the Court,* same being, to-wit:—

Chicago, Ill. August 13, 1940.
Sold on Wednesday and Thursday, July 17 and 18,
Ben Gold, Trustee, in the matter of Ella H. Tinkoff

1940 by order of the United States District Court, No. (73,451) items contained in Warehouse Lot EV4752 of 6345 N. Broadway, Chicago, Illinois.
Received by me from the David Storage & Moving Co.

Albert J. Menedelssohn, Dr.
423 S. Wabash Avenue
Chicago, Illinois.

Gross Sale as per attached statement		$6969.05
Deductions:		
Auctioneer's commission at 10%	696.90	
Expense incurred in unpacking 7 van loads, extra help, time and a half for overtime, repairs, cleaning, etc. 15 days @ $30.00 per day	450.00	
Daily news Ad. July 16, 22 lines @ 35c	7.70	
Window signs	4.00	
850 Government Post Cards and Printing	12.50	
Police Guard, 3 days @ $7.00 per day	21.00	
Photostats of Inventory by order of Trustee	13.15	
Locksmith	2.00	
Keys for sideboard	.50	
Advertising allowance by Court	100.00	
Legal services Spitz & Adcock	530.00	1837.75
		$5131.30

17. That an examination of the said summary shows that the Auctioneer *paid for the ad in the Chicago Daily News, inserted by the Trustee on July* 16, 1940, totaling $7.70; and also the legal services of Spitz & Adcock, $530.00, and also the Auctioneer's commission of $696.90, plus $450.00 for display and $100 for advertising, per the private contract and not the Statutory Auctioneer fees.

18. That in this proceeding the Appellants have en-

deavored through voluminous motions to have a hearing, and that the Referee and Trustee were as determined as the Appellants were insistent, to deprive the Appellants of a hearing, and that numerous petitions for review were pending, due to the failure of the Referee to act, *and all of these petitions for review pending in the Trial Court were dismissed on the ground that the Court lacked jurisdiction of this proceeding.*

That the Court still retained jurisdiction to administer the proceeds from the sale of the property without determining *who's property was being sold,* and that it is to be noted that the Referee on February 26, 1941 entered an order, *prepared by the Trustee's attorney, without notice to the Appellants, dismissing the cause for want of jurisdiction.*

and conclusions of law (R. 133-140), was set aside by the 18(b). That this order, voluminous in its findings of fact Bankruptcy Court on September 8, 1941, and that the said Trustee, his Reporters and Referees are claiming compensation from the Debtor for their unfruitful efforts from July 16, 1940 up to September 8th, 1941.

19. That on February 26, 1941 the Referee in his order dismissing the Debtor's petition for a Real Property Arrangement, said in part as follows (R. 134):

> "Numerous hearings were had before me * * * commencing the 4th day of November, 1940, and ending this day, February 26, 1941, during which period the *Trustee introduced and completed the offer of evidence in support of the motion to dismiss,* which evidence upon conclusion was adopted by the Petitioner, David Storage & Moving Company (R. 134).
>
> "*And the Trustee as respondent moved for an order dismissing debtor's petition filed herein for a Real Property Arrangement* (R. 135).

"That said debtor Ella H. Tinkoff, and Paysoff Tinkoff Claimant herein have heretofore filed approximately *twelve* petitions for review of sundry orders entered in the course of the administration of this estate since the filing of the voluntary petition by the Debtor on the 15th day of July, 1940 (R. 138). * * *

"It is therefore ordered * * * that the petition filed herein * * * be and the same is hereby dismissed; (R. 140) and

"It is further ordered that the *various petitions for review of orders entered in this proceeding*, filed by Ella H. Tinkoff and Paysoff Tinkoff, or either of them, appearing of record in this cause, be and they are *hereby respectively dismissed;* It is further ordered that the Court *reserve and retain jurisdiction of this cause* for the purpose of *disbursing a certain fund now in the custody of Ben Gold, Trustee.*" (R. 140). (Italics supplied.)

20. That during the proceedings from July 15, 1940, to June, 1945, while $7,000.00 proceeds of the sale by the Auctioneer was in the jurisdiction of the Bankruptcy Court, the Appellants were unable to obtain small advances to pay their rent, to avoid evictions, and provide for other necessities for their family, on petitions duly presented to the Court at least three times (see R. 123, 157, 160, 163, 174).

21. That during said proceedings Appellants were evicted from their apartment three times because of their inability to obtain funds, while the Trustee was using the funds of the Debtor to oppose and object to the Debtor's action to obtain relief in this proceedings, and to dismiss Debtor's petition and further to prevent the said Auctioneer to account for the $1800 withheld from the proceeds of the sale to cover his expenses, of which $530.00 was used for fees of the attorneys for the Auctioneer, to-wit: Spitz and Adcock, in endeavoring to vacate the restraining order, which

action was obtained solely as a result of the said Louis Cohen, attorney for the Trustee, prior to his appointment on July 17, 1940, and to prevent Appellants from obtaining their property from Chicago State Pawners, Ltd., Pawnbrokers.

22. That the Trustee in his answer to the Appellants to have a hearing on the 29 pending motions prays that the hearing on the same be postponed until the determination of the Petition to Dismiss, same being as follows:

(R. 215)

> "Wherefore your Respondent moves that all motions of the said Debtor and Paysoff Tinkoff, hereinabove referred to in his answer, be postponed until after determination of the Petition for Dismissal of Debtor's Petition and answers thereto."

23. That relating to the Petition of the Court Reporters for fees of Shipman, Eamon and Moye, an original petition was filed by the said Court Reporters on October 9, 1941 (Original Record 367), seeking $239.80, that answers were filed thereto, and that hearings were had on said petitions, but not completed, and remained incomplete, until the said Reporters filed a new petition, before Referee Ward, without notice to the appellants, claiming $352.30.

24. That the record shows that the Court Reporters admitted that no work was done by the said Court Reporters for the Appellants, but solely done at the request of the Trustee (R. 256-261), and does not show the dates, the time spent, and for whom services were rendered in their petition or evidence.

25. The record further shows (R.262-268) that the Trustee, Ben Gold, at no time rendered any services to the Estate that was beneficial to the Estate; that the said

Trustee was not necessary, and all the Trustee did was to act as a depository of funds from the Auctioneer, and that the said Trustee refused to do any acts required by the statute, to wit (1) set aside the exemptions of the Debtor, (2) hear the Reclamation petition of Paysoff Tinkoff, and (3) determine whether the property sold, by the Auctioneer, was that of the Debtor or a third person; (4) determine who had priority, whether the United States or the Warehouseman; (6) fail to receive instructions from the Court to authorize the said Trustee to proceed in prosecuting the Petition to Dismiss the Debtor's Petition, (7) fail to fix the amount of the Supersedeas Bond (R. 72), (8) examine the Auctioneer, and compel him to submit report of sales required by the Bankruptcy rules, and to account for $1800 withheld from the proceeds of the sale; (9) require the David Storage & Moving Co. and the Auctioneer to file adequate bonds of at least $50,000 to protect the Estate and himself, as Trustee, and to file their private contract relating to the auction sale; (10) fail to act as a disinterested party and officer of the Court, and (11) do all acts contrary to that provided by the Bankruptcy Act, and the law, solely to deprive Appellants to their rights and property; and which illegal acts deprived the said Trustee and his attorney of any rights not only to compensation for services, but also for any advances that may have been expended by them for expenses.

26. That the said Trustee had repeatedly stated that he believed that he was acting within his authority in advising and proving to the Court that the Court had no jurisdiction to entertain the Debtor's Petition, when the Trustee stated as follows:

(R. 243)

"I have always taken the position in this Court and the Circuit Court of Appeals, that it is the duty of the Court Officer to bring matters to the attention of the Court that would affect its jurisdiction; as counsel representing the Trustee I should come in and report any defective matters of jurisdiction that may become a nullity later on."

(R. 254-255)

"I realized that the Court at the inception of the proceedings was without jurisdiction, and the filing of these petitions was an imposition on this Court, and moves subsequently made by Mr. Tinkoff, which he had no right to make, but did make, because he had been disbarred and had no right to practice law. I knew they had to be resisted, and consequently, in order to properly protect the Estate and the parties, and protect the Court, it was necessary to render all these services."

(R. 268)

"I repeat, it is the duty of a trustee to come into this Court and inform the Court when its jurisdiction is being imposed upon, and that is exactly what I did."

27. That the Trustee in his final report, says, in part:

(R. 149)

"That your Trustee's counsel presented proof in support of the motion to dismiss which proof was adopted by petitioner, David Storage and Moving Company, which proof was received in evidence."

And further the Trustee says:

(R. 253)

"On the 17th day of July, 1940 I conferred with the David Storage and Moving Company and the Auctioneer that was employed to sell the property. *We prepared a draft order that the restraining order be vacated, and that the sale continue.*"

28. That said Louis Cohen, attorney for the Trustee, when testifying in open court on Sept. 21, 1945, said, in part:

> "I got into the matter on July 17; conferred with the parties and prepared a draft order which was signed by the referee, vacating the restraining order and permitting the warehouseman to sell it at auction."

29. That the Trustees Bond was filed on July 18, 1940, and prior to the filing thereof, was not qualified to act as a Trustee.

30. That said Trustee's attorney, on July 17, 1940, prior to his appointment by the Court, as the Trustee's attorney, advised the Appellants to go along with the Trustee in this case, and if they didn't, he (the attorney for the Trustee) would see the Appellants in their graves first (see R. 16, 167, 267).

31. That your Appellants immediately filed their Petition to remove the Trustee and his attorney, on the additional ground of bias; and failed to get a hearing thereon during the entire proceeding from July 1940 to June 1945, the Appellants having filed their Objection to the appointment of the Trustee on July 17, 1940 (Orig. R. 26).

32. That the Referee failed to serve Appellant with a copy of their Petition for fees and expenses, and set no hearing thereon; and introduced no evidence to support his claim for fees and expenses.

VIII.

Trustee Approved the Sale of Undetermined and Unappraised Property Valued at $90,000.00, to be sold at Auction for $6,969.05, of which the Trustee recommended, and the Court approved $4647.01, as authorized administrative expenses, or 67% thereof, and the balance of $2,322.04 to be applied as a reduction of the warehouseman's lien to the David Storage and Moving Company.

1. The Trustee's duty is to inform the Court of all unjust charges in the administration of an estate.

2. That in this proceeding, personal property claimed by both the Debtor and Claimant, valued at $90,000.00, was sold at auction for $6,969.05.

3. That the Auctioneer made no report of sale, or filed same in Court, per the Bankruptcy Rules; and neither did the Auctioneer account to the Court for withholding $1,837.75 out of said auction proceeds.

4. That out of the gross proceeds from said auction sale of $6,969.05, that 67% thereof, or $4,647.01, was authorized by the Court as administrative expenses, and same being distributed as follows:

			Amount	*Percent*
a.	To Ben Gold, Trustee.			
	Fees	$ 142.62		
	Expenses	14.80	$ 157.42	.2%
b.	To Louis Cohn, Attorney for Trustee.			
	Fees	$1500.00		
	Expenses	28.66		
	Other Expenses	295.88	1824.54	26.5%
c.	To Martin Ward, Referee.			
	Fees	$ 300.00		
	Expenses	175.00	475.00	.7%
d.	To Shipman, Eaman & Moye, Court Reporters, for Trustee		352.30	.5%
e.	To Albert J. Mendelssohn, Auctioneer		1837.75	26.5%
f.	Total Expenses Authorized Distributed		$4647.01	67%
g.	To David Storage & Moving Co., to apply on Warehouse Lien		2322.04	33%
h.	Total Gross Receipts, per Auctioneer's Report to Trustee, not filed in Court		$6969.05	100%

5. That the Debtor, Ella H. Tinkoff, did not realize one cent on her property above, although all the property was sold as the Debtor's.

6. That the Claimant, Paysoff Tinkoff, whose property was advertised for sale by the Warehouseman as that of the Claimant, did not realize one cent on his property, and

was forced to stand 67% of the administrative cost, relating to his property, though the Claimant was not subject to the jurisdiction of the Bankruptcy Court.

7. That although the Claimant stressed these points before the Referee, the Bankruptcy Court and the Circuit Court of Appeals, all tribunals, ignored Claimant's contention that he was not subject to the jurisdiction of the Bankruptcy Court, and also denied Claimant a hearing to prove the ownership of his own property, not subject to the jurisdiction of the Court.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

PROPOSITION OF LAW.

I.

The United States Circuit Court of Appeals Erroneously Applied the Law Enunciated by Eyster v. Gaff, 91 U. S. 521, in holding that the State Court had Concurrent Jurisdiction with a Bankruptcy Court, on a proceeding instituted prior to the Bankruptcy proceeding.

The Petitioners respectfully submit that the Opinion of the United States Circuit Court of Appeals in 141 Fed. (2) 731, (February 9, 1944) erroneously applied the law in the case of *Eyster* v. *Gaff*, 91 U. S. 521; 23 L. Ed. 403, holding that the State Court, in a proceeding instituted *prior* to bankruptcy, had concurrent jurisdiction with that of Bankruptcy Court.

That a careful reading of said Opinion, shows that that Court not only erroneously applied the law, as it exists today, but that it was in error, as to the facts, as they existed in this case.

The Opinion, in citing from the case of *Eyster* v. *Gaff*, says as follows:

> "It was the *duty* of that court to proceed to a decree as between the parties before it until, by some proper pleading in the case, *it was informed of the changed relations of any of those parties to the subject matters of the suit.*" (Italics ours.)

The facts, as disclosed by the record herein, show:

1. That a temporary injuction, restraining all State Court proceedings, was immediately issued on November 18, 1935, after filing of the Bankruptcy Petition on Nov. 15, 1935, under Section 74 of the Bankruptcy Act, as amended; and

2. That prior to the entry of the decree of foreclosure in the State Court, on January 28, 1936, motions were made, supported by verified petitions, on January 28, 1936, to stay the State Court proceedings until the determination of the Bankruptcy Proceedings which were still pending, which motions were denied,

3. That on March 6, 1936 the Circuit Court of Appeals had entered a Stay Order, staying all State Court proceedings, of which the State Court and the interested parties had actual notice and knowledge, but which Court and interested parties did on the next day, March 7, 1936, while the Petitioner was endeavoring to obtain a certified copy of said Stay Order to be filed in the State Court,—enter the order confirming the Master's Sale; and that the said certified copy of the Stay Order of March 6, 1936 was filed with the State Court,on March 7, 1936, within 20 minutes after the entry of the said State Court order confirming the Master's sale; and that the Master's sale was confirmed on a notice of motion only,—without service of a copy of the Petition to confirm the sale.

That applying the law quoted above in the case of *Eyster* v. *Gaff,* that the State Court had concurrent jurisdiction until "*informed of the changed relations of those parties to the subject matter of the suit*", the Petitioners herein submit that the orders of the State Court were null and void,

in that said State Court and the parties in interest had (1) notice, not only of the issuance of the restraining orders, but (2) also of the denial of the motion and Petition in the State Court to stay the proceedings due to the pendency of the Bankruptcy Proceedings, and (3) that the orders entered by the State Court, thus depriving the Bankruptcy Court of the subject matter or *res*, which the Debtor was endeavoring to have adjudicated,—by extending the time to pay debts of the Debtor,—thus deprived the Bankruptcy Court of further proceedings over the *res*, by the entry of the said orders.

II.

The Circuit Court of Appeals was in error in applying the Law Enunciated by the Case of Isaacs v. Hobbs Tie and Lumber Co., in holding that the said exclusive Jurisdiction of the Courts only applies to proceedings instituted after Bankruptcy, and not before Bankruptcy.

A careful reading of the Opinion of *Isaacs* v. *Hobbs Tie and Timber Company*, (284 U. S. 174, 51 S. Ct. 270, 75 L. Ed. 645) shows that the Supreme Court did not make the narrow distinction, as expressed by the Circuit Court of Appeals, that the Bankruptcy Court only has exclusive jurisdiction of property, in regard to State Court proceedings, which had been instituted *subsequent* to and *after*, the filing of the bankruptcy proceeding.

The Statute specifically says that the Bankruptcy Court has exclusive jurisdiction to deal with the property of the bankrupt estate at the time of the filing of the petition in bankruptcy.

Section 74 of the Bankruptcy Act, as amended, specifically provides that the Bankruptcy Court shall have exclu-

sive jurisdiction in all matters, including the property of the Debtor, irrespective of the date of the appointment of a Trustee in any pending cause, or issrespective of the institution of said proceedings, provided the *final decree* has not been entered in said proceedings; and therefore the Petitioners contend that since there was no final decree in the pending foreclosure proceedings on November 15, 1935, —at the time when the bankruptcy proceeding was instituted,— that the State Court automatically lost its jurisdiction, and the same automatically became vested in the Bankruptcy Court's exclusive jurisdiction.

Section 74-m of the said Bankruptcy Act, as amended, is in part as follows:

> "(m)—The filing of a debtor's petition * * * shall subject the debtor and his property, wherever located, to the *exclusive* jurisdiction of the Court in which the order approving the petition * * * is filed; and this shall include property of the debtor in the possession of a trustee under a trust deed or a mortgage, or a receiver, custodian or other officer of any court in a pending cause, *irrespective of the date of appointment of such receiver* or officer, or the *date of the institution of such proceedings*).
>
> Provided, that it shall not affect any proceedings in any court in which a *final* decree has been entered.
>
> In proceedings under this section * * * the jurisdiction and powers and duties of its officers and, subject to the approval of the court, their fees, the duties of debtor, *the rights and liabilities of creditors,* and of all persons with respect to the property of the debtor and *the jurisdiction of appellate courts* shall be the same as if a voluntary petition for adjudication had been filed and a *decree of* adjudication had been entered on the day when the debtor's petition * * * was filed, and any decree of adjudication thereafter entered shall have the *same effect* as if it had been entered on that day."
> (Italics Supplied).

Section 74(n) provided for a stay of pending suits in any Court, in addition to Section 11 of the Bankruptcy Act, which Section is in words as follows:

> "In addition to the provisions of section 11 of this Act for the staying of pending suits, the court, on such notice and on such terms, if any, as it deems fair and equitable, may enjoin secured creditors who may be affected by the extension proposal from proceeding in any court for the enforcement of their claims until the extension has been confirmed or denied by the court."

The Petitioners respectfully represent that this Section 74 (n) did not deprive the Bankruptcy Court of the *exclusive power* granted to it by Section 74(m), but only further enunciated the specific power in the Bankruptcy Court to stay a proceedings in other Courts, so as to prevent a conflict of jurisdiction.

In other words, there is a distinction between the *power* granted the Bankruptcy Court and the *exercise* of that power; and Petitioners submit that failure to obtain a restraining order or stay order did not deprive the Bankruptcy Court of exclusive jurisdiction under Section 74(m) in a State foreclosure proceeding instituted prior to the said Bankruptcy proceeding.

But, even assuming that the Petitioner is wrong, where there has been *no specific notice* brought to the attention of the State Court, the facts in this case conclusively show the State Court proceedings were restrained not only by an order of the District Court on Nov. 18, 1935 prior to the entry of the final decree of foreclosure on January 28, 1936; and also by an order of the Circuit Court of Appeals on March 6, 1936, prior to the order of the final confirmation of the Master's Sale on March 7, 1936.

Therefore, the Petitioners respectfully represent that this Court in applying the law as enunciated in the case of *Isaacs* v. *Hobbs Tie and Lumber Co.*, intended that there should be no distinction as far as the Bankruptcy's jurisdiction is concerned, relating to any Court proceeding instituted *prior* or *subsequent* to the bankruptcy proceeding, especially under the undisputed facts existing in this case.

The Petitioners submit that this Court did not intend to make any distinction between a proceedings instituted *prior* to bankruptcy and one instituted *subsequent* to bankruptcy, as is fully shown in the case of *Taylor* v. *Sternberg*, 293 U. S. 470; 55 S. Ct. 260, wherein the Court held that an order of the State Court fixing the compensation of the Receiver and his Counsel, made after the institution of the bankruptcy proceedings, was a nullity.

In this case an insolvency proceeding was instituted on January 10, 1931 in the State Court, and on February 11, 1931 a Petition in Bankruptcy was filed in the Federal District Court. On February 13, 1931 the corporation was adjudicated a bankrupt and on the same day, February 13, 1931, the State Court allowed a Receiver and his Attorney compensation.

There is no finding of fact in this case that the State Court had knowledge of the pending Bankruptcy proceedings, or that a Stay Order was issued by the Bankruptcy Court.

This Court held in substance, that any orders entered by the State Court in a pending proceeding involved the property of the bankrupt, after institution of the Bankruptcy proceedings,—even in proceeding instituted prior to bankruptcy—were entirely null and void, and on pages 472 and 473 this Court stated as follows:

(P. 472) "In the present case, with the supervening bankruptcy, the possession of the state court came to an end, and that of the bankruptcy court immediately attached. * * * (P. 473) But with the filing of the petition in bankruptcy, the power of the state court in that respect ceased; and its order fixing the compensation of the receiver and his counsel was a nullity because made without jurisdiction, such jurisdiction then having passed to the bankruptcy court. * * * That estate, including such sums, was still in *custodia legis* —only the possession had passed automatically from the state court to the bankruptcy court. Thereafter, the estate in its entirety was held by the receiver as a mere repository for the bankruptcy court and therefore not adversely."

This Court in the case of *Gross, et al.* v. *Irving Trust Company,* 289 U. S. 342; 53 S. Ct. 605, held that the Bankruptcy Court's jurisdiction is exclusive and supersedes a State Court's jurisdiction in a proceeding entered *prior* to the said bankruptcy proceeding; and that any orders entered by the State Court after the bankruptcy proceeding were null and void.

In this case a Receiver was appointed for the Crosby Stores, Inc., by the State Court on October 13, 1931, and took possession of the corporation's property. On the next day, October 14, 1931, an Involuntary Petition was filed against the corporation, a Federal Receiver was appointed for the corporation, which was subsequently adjudged a bankrupt in the Federal District Court, and the Federal Receiver made a Trustee.

On December 14, 1931 the State Court made allowances to the Receiver and his counsel for fees. There is no findingof fact that that State Court had knowledge of, or a Stay Order was issued by, the Bankruptcy Court.

The Trustee subsequently obtained an order to restrain the State Receiver and his Attorney from disposing of the said fees. The District Court and Circuit Court of Appeals sustained this restraining order, and this Court affirmed it, holding that the jurisdiction of the Bankruptcy Court was superior as a result of statute, and in that case this Court said, beginning on page 344, as follows:

> "Upon adjudication of the bankruptcy, title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has *exclusive* jurisdiction, and that court's possession and control of the estate cannot be affected by proceedings in other courts, state or federal. • • • Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself. • • • The *filing of the petition is a caveat to all the world and in effect an attachment and injunction.*" (Italics supplied.)

And on page 345, this Court further said:

> "The jurisdiction of the bankruptcy court being *paramount*, the power of the state court to fix the compensation of its receivers and the fees of their counsel necessarily came to an end with the supervening bankruptcy. When the bankruptcy court acquired jurisdiction, the sole power to fix such compensation and fees passed to that court. • • • Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court."

On page 344, this Court said:

> "In *Buck* v. *Colbath*, 3 Wall. 334, 341, 18 L. Ed. 257, the rule is stated to be that 'whenever property has been seized by an officer of the court, by virtue of

its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, *unless* it be some court which may have a direct supervisory control over the court whose process has first taken possession, *or some superior jurisdiction in the premises.*" (Italics supplied.)

The Petitioners respectfully submit that as the Bankruptcy Court has, pursuant to the Federal Constitution, its superior jurisdiction over the State Court, as a result of the Bankruptcy Act, it must therefore follow, as shown by the Court in *Gross* v. *Irving Trust Company,* above, that the filing of a bankruptcy petition *supersedes* the jurisdiction of a State Court in any matter pending *prior* to the filing of the petition in bankruptcy; and further that the Opinion of this Court in *Isaacs* v. *Hobbs Tie & Timber Co.* was not restricted and limited, as stated by the Circuit Court of Appeals in the case of *In Re Ella H. Tinkoff,* 141 Fed. (2) 731, in limiting the exclusive jurisdiction to the proceedings filed *subsequent* to the bankruptcy proceeding, and excluding the superior and exclusive jurisdiction in those proceedings filed *prior* to said bankruptcy proceeding.

That this limitation and restriction, your Petitioners respectfully submit, is in *conflict* with the decision and interpretation of this Court in the case of *Isaacs* v. *Hobbs Tie and Timber Co.,* aforementioned; and that therefore the said opinion of the Circuit Court of Appeals is in direct conflict with the decisions of this Court, in restricting the exclusive bankruptcy jurisdiction to proceedings instituted after the filing of the bankruptcy proceeding, instead of applying the exclusive jurisdiction to all proceedings, *before and after.*

That the said Circuit Court of Appeals was further in error in specifically ignoring Section 74(m) of the Statute, which specifically provides that the jurisdiction of a State Court, and in fact, any court, wherein no final order had been entered, was superseded by the filing of a bankruptcy proceeding; and this regardless of the decisions of this Court in *Isaacs* v. *Hobbs Tie and Timber Co., Taylor* v. *Sternberg* and *Gross* v. *Irving Trust Company,* holding that the filing of a bankruptcy petition supersedes all State and Federal Court proceedings, filed either *before* or *after* the bankruptcy proceeding, since this Statute specifically states that the Bankruptcy Court shall have *exclusive* jurisdiction over all pending proceedings, at the time of the filing of the Bankruptcy proceeding, where no final decree has been entered in said pending proceedings.

III.

The Circuit Court of Appeals overruled its decision in In Re Ella H. Tinkoff, 141 Fed. (2) 731, by its Decision in In Re Peer Manor Building Corporation, 153 Fed. (2) 803; and the latter is in direct conflict with the former.

The Circuit Court of Appeals in the case of *In Re Peer Manor Building Corporation,* 153 Fed. (2) 802, overruled its decision in the case of *In Re Ella H. Tinkoff,* 141 Fed. (2) 731, in that in *Peer Manor Building Corporation* case that Court specifically held as follows on page 804:

> "The filing of the petition is a declaration to the world that the court has taken jurisdiction under the *paramount* bankruptcy power of the constitution."

In the *Peer Manor* case the State Court proceedings were brought prior to the Bankruptcy Proceedings filed on July 8, 1943, and no restraining order was ever issued in that case, and the State Court decree was entered on February

8, 1944, subsequent to the institution of the bankruptcy proceedings on July 8, 1943.

With those facts, that Court in its opinion, decided that orders entered by the State Court subsequent to the institution of the Bankruptcy Court Proceedings were absolutely null and void, and that the Bankruptcy Court Proceedings were exclusive and paramount to that of the State Court, and not concurrent to that of the State Court.

That Court in the *Peer Manor Building Corporation* case endeavors to distinguish that case from that Court's decision in the *Tinkoff* case above, 141 Fed. (2) 731, and has greatly misapplied the facts and the application of the law thereto, and has in substance overruled decision and finding in the *Tinkoff* case.

The facts in the *Tinkoff* case are *by far stronger* than those in the *Peer Manor* case, for in the *Tinkoff* case both State Court proceedings were instituted prior to the Bankruptcy proceedings, instituted on November 15, 1935, and restraining orders were issued and were in force and effect, and also the Court had notice of the pendency of the Bankruptcy proceedings by denying a motion to stay same.

On January 20, 1936 the *Tinkoff* case was dismissed, and a motion to vacate was immediately made on January 22, 1936, which was denied on February 5, 1936, and that the Circuit Court of Appeals entered its order of affirmance in July 1936 (85 F. (2) 305), and the Petition for Certiorari was denied by the Supreme Court of the United States on January 4th, 1937, and petition for rehearing denied later.

That the Circuit Court of Appeals on March 6, 1936 is-

sued an *ex parte* restraining order against the Chicago Title & Trust Company to restrain them from further proceeding in the State Court,—especially on March 7, 1936 to conform the Master's sale,—and that notice of said restraining order was immediately given by the Appellants on March 6, 1936 to the Chicago Title & Trust Company and its attorneys.

That before the Appellants could obtain a certified copy of the order from that Court, on March 7, 1936, said Chicago Title & Trust Company did, present its motion to confirm the Master's Sale on March 7, 1936, and the State Court did then and there, at the insistence of the Chicago Title & Trust Co., refuse to continue the hearing on the motion of the attorney for Appellants, for a few minutes, until a certified copy of the restraining order could be obtained; and the State Court did then and there enter the order of confirmation of the Master's Sale on March 7, 1936, and that within *twenty* minutes thereafter, on March 7, 1936, Appellants filed the said certified copy of the restraining order of March 6, 1936 with the State Court on March 7, 1936; and that the State Court did then and there refuse to vacate the order restraining the Master's Sale it had just entered, or enter any other order in the State Court proceedings, due to said restraining order of this Court.

That Tinkoffs contended that the order entered by the State Court on March 7, 1936, after the entry of the restraining order of March 6, 1936, in the *Chicago Title & Trust Company* case was absolutely void, not only because entered while the Bankruptcy proceedings were pending, but also entered after having knowledge and actual notice that a restraining order had been entered by this Court. (See *In Re Lemmon*, 166 U. S. 548, 17 S. Ct. 658; 14 R. C. L. 471-2.)

The Tinkoffs further allege that in the *Hamm* case, this being a *strict* foreclosure, a decree was entered on February 4, 1936 after the institution of the Bankruptcy proceedings on November 15, 1935, and after they had actively participated in the Bankruptcy proceedings, and had knowledge and notice thereof, and that under the Statutes of Illinois the proceedings are still pending. (See Chap. 110, Sec. 174 (Ill. Rev. Stat. 1941 Ed.), Sub. 8, Appendix, where service has been by publication, and not by personal service.)

The Chicago Title and Trust Company, and The Continental Illinois Trust and Savings Bank, each had notice of the said Bankruptcy proceedings filed on November 15, 1935, and were interested parties in the various hearings to dismiss the said proceedings in bankruptcy, and that following the decision of that Court in the *Peer Manor* case, the orders entered by the State Court, after November 15, 1935, were absolute nullities, as both parties took an active interest in the Bankruptcy proceedings; and, as said by that Court on page 805:

> "We do not mean to imply that the filing of a petition for reorganization automatically stays foreclosure proceedings, but we do assert that inasmuch as *appellant* was a party to the reorganization proceeding, indeed, *was struggling to defeat the jurisdiction of the bankruptcy court* he was thereby charged with notice of the *exclusive* character of the bankruptcy proceeding, and of what the court in pursuance of that jurisdiction might do thereafter in regard to the property. He knew that when the bankruptcy court took jurisdiction that jurisdiction *superseded* that of all other courts, and that any action he might take in the state court in his foreclosure suit would be *attempted fraud* upon the jurisdiction of the bankruptcy court." (Italics supplied.)

That Court, further citing from the case of *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 53 S. Ct. 605, 77 L. Ed. 1243, said on page 804:

> "Upon adjudication * * * title to all the property of the bankrupt * * * vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has *exclusive* jurisdiction, and that *court's possession and control of the estate cannot be affected by proceedings in the other courts, State or federal.* * * * Such jurisdiction having attached, *control* of the administration of the estate *can not be surrendered even by the court itself.* * * * *'The filing of the petition is a caveat to all the world and in effect an attachment and injunction.'* In *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 S. Ct. 270, 272, 75 L. Ed. 645, the court announced: 'The jurisdiction in bankruptcy is made *exclusive* in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it *beyond the power of the court's own officers to oust it by surrender of property which has come into its possession.* * * * Indeed, *a court of bankruptcy itself is powerless to surrender its control in the administration of the estate.*'" (Italics supplied.)

In the case of *Eyster* v. *Gaff*, 91 U. S. 521, decided in 1875, cited in the *Tinkoff* case, *supra*, under the Bankruptcy Act of 1867, this Court held, in substance, that where the Assignee (Trustee) did not file a motion or pleading in the State Court proceeding, the Debtor having filed a petition in bankruptcy, and upon being adjudicated a bankrupt, the Bankruptcy proceeding would not of its own effect divest the State Court of its jurisdiction, since each court had *concurrent* jurisdiction, and the court first taking jurisdiction of the *res* would continue to do so until final determination. This is overruled by *Gross* v. *Irving Trust*

Co., 289 U. S. 342, 53 S. Ct. 605, which held that the Bankruptcy jurisdiction was exclusive, due to superior jurisdiction.

There was no allegation in the *Eyster* case, and there was no showing that the mortgagee was an "interested party" in the bankruptcy proceeding; and the court, in substance held, that the mere filing in the State Court by a trustee of his appointment in the bankruptcy court, with no plea or motion to take part in the State Court proceeding, did not oust the State Court of jurisdiction; since no court takes judicial notice of proceedings in another court, and since the State Court did not take judicial notice of the proceedings in the Bankruptcy Court.

The following tabulation gives the material information of the facts in the *Peer Manor* and the *Tinkoff* cases, to wit:

	1. Name	2. Date: State Suit filed	3. Date: Bankruptcy Suit filed	4. Date: State Court Decree entered	5. Was a Restraining Order Issued
(1)	In re Peer Manor Bldg. Corp.	Prior to 7-8-43	July 8, 1943	Feb. 8, 1944	No.
(2)	In re Tinkoff (Mallers	June 22, 1934	Nov. 15, 1935	Jan. 28, 1936	Yes.
(3)	In re Tinkoff (Hamm)	Aug. 7, 1935	Nov. 15, 1935	Feb. 4, 1936	Yes.

Under the Bankruptcy Act amended, in existence in 1935, under Section 74, sub-paragraph "m", the Bankruptcy Court had exclusive jurisdiction in all cases in any proceeding in any court *in which a "final decree' has not been entered;* and the decree of foreclosure was not entered in this case by the State Court until January 28, 1936,—after November 15, 1935, when Bankruptcy was instituted,—and

the sale confirmed on March 7, 1936, relating to the Mallers property; and on February 4, 1936, the strict foreclosure decree was entered relating to the Hamm property.

The Circuit Court of Appeals in distinguishing the *Tinkoff* case from the *Peer Manor Building Corporation* case, on page 805 said:

> "That decree was entered some four years prior to the filing of the petition for arrangement, so that when the bankruptcy court took jurisdiction, the debtor had long since lost all title to the property."

That statement would be true if the State Court decrees entered in 1936 were valid; but if same were invalid, then no final decree was ever entered in the State Court proceedings, and the possession and title is still that of the Debtor, and has never been legally divested from the Debtor; and not only did an Equity of Redemption remain in the Debtor, but such redemption period did not begin to run until valid final decrees were entered in the State Court proceedings; and none having been so entered to date, the decrees of 1936 are ull and void; and therefore, the Debtor has not only a substantial equity in her real estate to arrange, but also had had an equity of redempiton after final decrees in the State Court proceedings, to protect.

The Court's above erroneous finding could only be premised on the State Court decrees being final and valid; and Petitioners contend that such decrees, being invalid, were nullities and void, and of no force and effect, and that therefore the State Court proceedings are still pending.

Therefore, the Petitioners respectfully submit that the Court's opinion in the case of *In Re Peer Manor Building Corporation*, 153 Fed. (2) 802, is directly in conflict with *In Re Ella H. Tinkoff*, 141 Fed. (2) 731, and in fact overrules the *Tinkoff* case, which was erroneously decided, in

not following the law of this Court, as reflected by its decisions, and is in direct conflict with the *Tinkoff* case. *In re Matter of Ella H. Tinkoff,* 156 F. (2) 405, and 141 F. 731.

IV.

The Continuation of the State Court proceedings by the Chicago Title and Trust Company, (34 S. 8978), re the Mallers property, after having notice and knowledge of the issuance of the stay order by the Circuit Court of Appeals, was an illegal Act, and any action taken thereafter was null and void.

The Appellees admit the facts that the Stay Order was issued by the United States Circuit Court of Appeals on March 6, 1936, and the order of the State Court,—confirming the sale, of March 3, 1936,—was entered on the motion and insistence of the Chiciago Title and Trust Company, on March 7, 1936, after receiving notice and knowledge that a stay order of said State Court proceedings had been entered by that Court on March 6, 1936.

The order of confirmation was the final order in the State Court proceeding to start the running of the period of redemption of 12 months for the mortgagor, or 15 months for the creditors of the mortgagor.

The Supreme Court of the United States in *In Re Lennon,* 166 U. S. 549, on p. 554, said:

> "To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."

The Supreme Court in *Union Tool* v. *Wilson,* 259 U. S. 107, on page 113, said:

"Knowing of the injunction, it would have been bound to obey it, even if no writ had issued."

See also *Carrigan* v. *U. S.* (C. C. A. 7th) 163 Fed. 16; 23 L. R. A. (N.S.) 1295.

In 28 American Jurisprudence 332, the author says:

"The general rule is that one is bound by an injunciton although not a party to the suit therefor, if he has notice or knowledge of the order, and is within the class of persons whose conduct is intended to be restrained or acts in concert with such person."

In 55 American Decisions 722, the author says:

"In the case of an injunction, if the the defendant obtains a knowledge of its contents, and of its having been granted, no matter how he gets his information, he is as much amenable to the law for a violation of its mandate as if the writ had been actually served upon him by the proper officer of the court."

Petitioners therefore respectfully submit that the Chicago Title and Trust Company, having entered its order on March 7, 1936, after the issuance of the Stay Order by the Circuit Court of Appeals on March 6, 1936, that the said order of March 7, 1936 was illegal and void—this even assuming that the State Court had jurisdiction over the subject matter and the parties, prior to the issuance of the Stay Order of March 6, 1936.

In 28 American Jurisprudence 504 the author said:

"An act done in *violation* of an injunction, *being unlawful*, it is deemed *ineffectual* and *unavailable*, as to the purpose intended, as though it had not been done."

* * *

"An enjoined sale or transfer may be void, however, where made to one who has notice of the injunction." (50 L. R. A. (N. S.) 871).

The Petitioners, therefore, respectfully submit that any acts of the Chicago Title and Trust Company in prosecuting the State Court action, Cause No. 34 S 8987, after the issuance of the Stay Order of the Circuit Court of Appeals, of March 6, 1936 with notice thereof, were illegal; and being illegal were therefore null and void; and that therefore the order of March 7, 1936 was a nullity, subject to collateral attack, and that without such order no final order had been entered in the State Court proceeding, which would prevent the Debtor from having an equity in her property, in instituting this proceedings under Chapter XII of the Bankruptcy Act, as amended, contrary to the contention of the Trustee in this proceeding.

V.

The State Court Proceedings, Re The Hamm Property, entitled Continental Illinois National Bank and Trust Company v. Ella H. Tinkoff, et al, No. 35 S 11323, is still pending in the State Court.

1. The record shows that the final default decree was entered in the case of *Continental Illinois National Bank and Trust Company* v. *Ella H. Tinkoff, et al,* No. 35 S 11323, on February 4, 1936, one day prior to February 5, 1936, when the District Court denied the Petitioners' motion to vacate the order of dismissal.

2. That these proceedings were instituted against the Claimant, Paysoff Tinkoff, as a Defendant, by publication, and who at that time was a resident in the City of Leavenworth, State of Kansas, and that pursuant to Section 174, Chapter 110, Subdivision 8 of the Illinois Revised Statutes, 1941 Edition,—a final decree in chancery, entered against a defendant who has been served by publication may be vacated on petition duly filed within one year after such de-

cree, if no notice has been given of the entry of such decree, —which was the fact in this case.

3. That pursuant to this section, on February 4, 1937, a petition to vacate said default decree in that proceeding was filed with leave given, pursuant to an order entered by the State Court, on February 4, 1937, that this petition be heard on notice from either party.

4. That this petition to vacate is still pending in the State Court, and has recently been called up for hearing in the said State Court, and therefore this proceeding is still pending in the State Court pursuant to the statute, Subdivision 8, Section 174 of Chapter 110, Illinois Revised Statutes, 1941 Ed. allowing said decree to be vacated and set aside where service has been made in a chancery proceeding by publication (see Appendix "L").

5. That the Circuit Court of Appeals, admitting the facts in their opinion in 141 Fed. (2) 731, erroneously contends that this motion was in the nature of a motion to vacate,—which, pursuant to Illinois Statutes, must be filed within thirty days—; but the motion and petition filed, in this proceeding was made under this particular Statute which allowed the petition to be filed within *one* year, in order to vacate the same, where service has been by publication and not personal (See Appendix "L" for copy of provisions of the Illinois statute).

6. That therefore the Circuit Court of Appeals was in error, in holding that Hamm proceedings were not pending in the State Court, because the said petition to vacate was filed within one year and not within one month; and that this holding by that Court is in direct conflict with the Illinois Statute, Chap. 110, Sec, 174 (8), and the Illinois Decisions interpreting said Statute aforementioned and that

therefore the said proceeding is in substance and in fact still pending, because hearings on said motion and petition are at present under consideration before the State Courts of Illinois.

VI.

The Trustee recommended and approved the appointment of the auctioneer in violation of the Statute and Rules of this Court, and also prevented him from filing his report of the sale.

1. The record shows the Trustee did not file his Bond until July 18, 1940, and that pursuant to Section 50-(b) of the Chandler Act, as amended, the Trustee could not qualify to act as a Trustee, even if validly appointed, before filing his bond.

2. That on July 17, 1940, the Trustee prepared the order to vacate the restraining order of July 15, 1940, having taken actual part in the proceedings to vacate the restraining order on July 16th and 17th, 1940, and also having advertised, on July 16, 1940 the property, as that of the Debtor, to be sold by auction before Albert J. Mendelssohn, Auctioneer, on July 17 and 18, 1940, without obtaining a Court order therefor, as provided by Rule 45 of the Bankruptcy Rules of the Supreme Court, and in Rule 10 of the Bankruptcy Rules of the District Court for the Northern District of Illinois, which requires the Trustee to file his Report within 7 days of the sale, each of which are shown in the Appendix hereto ("D" and "F" and "G").

3. That the said property sold by the Auctioneer was not appraised by the Trustee, and was not sold at 75% of the appraised value by the Auctioneer, or ten days notice provided pursuant to Rule 15 of the District Court Rules, as shown in the Appendix "G" hereto.

4. That Bankruptcy Rule 45 specifically provides as follows:

> "No auctioneer * * * shall be employed by a * * * trustee * * * except upon an order of the court expressly fixing the amount of the compensation or the rate or measure thereof."

5. That this rule was specifically violated by the Trustee when said Trustee allowed the Court on an *ex parte* motion, without notice to any party in interest, to approve the private contract between the Auctioneer and the Warehouseman,—without the contract or motion being filed,—allowing said Auctioneer fees greatly in excess of that provided by Statute or the Bankruptcy Rules, and further in preventing the Bankruptcy Court from having a hearing on Debtor's and Claimant's petitions to have the Auctioneer account to the Court for $1837.75, and to file his Report of Sale, and also to file his private contract with the warehouseman, executed prior and subsequent to the institution of the Bankruptcy proceedings under Chap. XII of the Chandler Act.

6. That your Petitioners repeatedly, from the institution of the proceedings, petitioned the Court to direct the Auctioneer to file his Report of Sale, and to identify his expenses pursuant to the statute, which petitions were repeatedly objected to by the Trustee on the ground that the question of jurisdiction would first have to be established, and which Petitions were never heard and disposed of, but were dismissed by the Bankruptcy Court after the proceeding itself was dismissed for want of jurisdiction.

7. The Auctioneer did send the Trustee voluminous reports relating to this sale, which neither the Auctioneer or Trustee filed with this Courtt, of which the Trustee gave your Petitioners the following, which your Petitioners filed with the Court as part of their Petition:

"Chicago, Ill. August 13, 1940.

"Sold on Wednesday and Thursday, July 17 and 18, 1940 by order of the United States District Court, Mr. Ben Gold, Trustee, in the matter of Ella H. Tirkoff (73,451) items contained in Warehouse Lot EV4752 received by me from the David Storage & Moving Co. of 6345 N. Broadway, Chicago, Illinois.

"Albert J. Mendelssohn, Dr.
423 S. Wabash Avenue
Chicago, Illinois.

"Gross Sale as per attached statement		$6969.05
Deductions:		
Auctioner's commission at 10%	696.90	
Expense incurred in unpacking 7 van loads, extra help, time and a half for overtime, repairs, cleaning, etc. 15 days @ $30.00 per day	450.00	
Daily News Ad. July 16, 22 lines @ 35c	7.70	
Window signs	4.00	
850 Government Post Cards and Printing	12.50	
Police Guard, 3 days @ $7.00 per day	21.00	
Locksmith	2.00	
Photostats of Inventory by order of Trustee	13.15	
Keys for sideboard	.50	
Advertising allowance by	100.00	
Legal Services, Spitz & Adcock	530.00	1837.75
		$5131.30

8. That this statement shows the Auctioneer deducted $1837.75 as expenses of the sale, which lasted two days, and that no accounting was made to the Court or anyone by the said Auctioneer in this proceeding of said deduction and withholding, and this action was approved by the Trustee and subsequently approved by the Referee, the Bank-

ruptcy Court and the United States Circuit Court of Appeals, without any hearings being had relating thereto.

9. That all this action was taken by the Trustee before being legally authorized and qualified to act as Trustee by filing his bond, which was completed and filed on July 18, 1940, and therefore all the acts of the Trustee, approved by the Court prior to July 18, 1940, were totally null and void.

VII.

The Trustee and his Attorney, being illegally appointed, were not entitled to any compensation.

The Circuit Court of Appeals in regarding the proposition, said, "We think there is no merit in this contention," without arguing any of the numerous cases supporting this contention, which were submitted by the Petitioners.

The record shows the Trustee's bond was filed on July 18, 1940; and that the Trustee was appointed by the Referee on his own motion, without any application by any party in interest, on July 16, 1940; and that on the same day, July 16, 1940, the Trustee advertised all the property as that of the *Debtor,* Ella H. Tinkoff, for sale on July 17 and 18, 1940, by Albert J. Mendelssohn, the Auctioneer; and that the Attorney for the Trustee was formally appointed by order of the Court on an *ex parte* petition, without notice, on July 17, 1940, although taking active part on July 16, 1940.

That your Petitioners immediately, on July 18, 1940, filed their Petition to Review the Orders of July 16, 1940, appointing Ben Gold Trustee; and on August 12, 1940 filed their Petition to Review the *ex parte* order of July 17, 1940, appointing Louis Cohn Attorney for the Trustee, the

latter petition being filed as soon as notice was received of the order of July 17, 1940.

That though your Petitioners have repeatedly requested hearings on their petitions objecting to the appointment of the Trustee and his Attorney, none were allowed or granted by the Court, due to the objection of the Trustee, that these petitions be disposed of after the Trustee's Petition to Dismiss had been been acted upon by the Court.

VIII.

The Circuit Court of Appeals was in error in holding that the warehouseman has a valid lien against the debtor or claimant, as this issue has not been determined to date, as no hearing was had or evidence taken relating there.

The Circuit Court of Appeals, in its opinion in *In Re Ella H. Tinkoff, Debtor*, 156 Fed. (2) 405, on pages 406-7, says:

> "In connection with our opinion that case (meaning *In Re Ella H. Tinkoff*, 123 Fed. (2) 528) it is sufficient to relate that the David Storage and Moving Company had a *lien* on certain chattels stored with it by the *debtor* and *claimant*."

The Petitioners submit that the validity of the Warehouseman's—The David Storage and Moving Company—lien, was directly put in issue, the Claimant and Debtor denying that the Warehouseman had any valid Warehouseman's Lien, when the temporary restraining order was issued on July 15, 1940 (R. 4-8), and the Warehouseman contended they had a valid lien against Paysoff Tinkoff, Claimant, when they filed their motion to vacate the restraining order on July 16, 1940 (R. 9-14); that no hearings were had upon this issue, or any evidence taken thereon; and although repeatedly requested by the Petitioners

to have a hearing on the issue of the validity of the Warehouseman's Lien, these hearings were repeatedly refused by the Court on objections by the Warehouseman, and the Trustee, who at all times contended that all the Petitioners' pending motions should be deferred until their motions to dismiss had been disposed.

Therefore, the Circuit Court of Appeals' finding, above, that the Warehouseman had a valid lien (123 Fed. (2) 528) was arbitrary and not supported by evidence or the record, since there was no finding by the Referee making a finding in favor of the Warehouseman that he had a valid lien, and there was no Petition for Review or Appeal by the Petitioners from such a finding, as none existed (See *Postal Telegraph & Cable Co.*, v. *City of Newport*, 247 U. S. 464, 38 S. Ct. 566).

The issue in the appeal in 123 Fed. (2) 528 was Petitioners' motion, made on July 18, 1940—three days after instituting this proceeding—to restrain the delivery by the Auctioneer of the sale of Debtor's and Claimant's chattels, and therefore it was impossible to hear evidence, argue the merits, and decide the question within three days after the proceedings were instituted, after taking into consideration the summary hearings on the motion to vacate the restraining order of July 15, 1940, which order therefore was prepared and entered by the Trustee on July 17, 1940.

IX.

A Trustee to be entitled to Compensation must be legally appointed, and must be impartial and disinterested, and the principal purpose of trustee in a Chapter XII proceeding is to see that the property is preserved, so as to effect a real property arrangement, if possible.

The Supreme Court of the United States, in holding that the compensation of assignees or trustees are a direct charge *upon the property,* and prior to the claims of creditors and stockholders, said in *Meddaugh* v. *Wilson,* 151 U. S. 33; 31 L. Ed. 183, as follows:

> "The services of assignees in bankruptcy not being to any parties or parties but in respect to the *property* itself, and to secure its proper application among all parties interested, it is clearly in accordance with the settled rules of equity jurisprudence, as well as with the practice in bankrupt jroceedings, that compensation for their services, including the pay of their counsel, should be made a *direct charge* upon the *property,* and a charge prior to right to the claims of creditors or stockholdres."

The Supreme Couprt of the United States in the case of *Woods* v. *City National Bank & Trust Company,* 312 U. S. 262; 61 Sup. Ct. Rep. 493, on page 497, in defining reasonable compensation to a claimant, said:

> "Furthermore, 'reasonable compensation for the services rendered' necessarily *implies loyal and disinterested services in the interest of those for whom the claimant purported to act.* * * * The Bankruptcy Court need not speculate, * * * or otherwise to dilute the undivided loyalty owed to those whom the claimant is purported to represent. Where *an actual conflict of interests exists* no more need be shown in this type of case to support a denial of compensation." (Italics supplied).

The Court in *In Re Lenters*, 225 Fed. 878, said as follows:

> "A Trstee in Bankruptcy occupies a fiduciary capacity, and is to some extent a shareholder, with duties to the bankrupt, as well as to creditors."

The Court in *In Re Sully*, 142 Fed. 895, said:

> "As to those creditors, the trustee represents them all equally alike. He must not advocate the cause of one against another, or *give to any creditor any advantage which the law does not give*, nor allow himself to be controlled in his administration of the trust by any creditors or group of creditors.
>
> "*As he owes a like duty to all, he must keep himself indifferent and give to all alike opportunities and absolutely impartial treatment.*"

(See also *West* v. *Bank of Lahoma*, 86 Pac. 59; 16 Okla. 508; *People* v. *Security Life Ins. Co.*, 79 N. Y. 267).

The record conclusively shows that from the very moment the Trustee and his attorney were appointed, their acts and conduct were openly hostile and prejudicial to the Debtor, and were favorable and beneficial to the adverse parties of the Debtor.

The entire record conclusively shows that practically all action in this proceeding was preformed by the Trustee through his attorney, against the debtor and her husband; and that the sole purpose of the Trustee's conduct and action was not only to oust the Court of jurisdiction to entertain this proceeding, not only to prevent the Debtor and the Claimant from obtaining a hearing in this proceeding on matters other than the question of jurisdiction; but also to carry out their threat, as hereinafter mentioned, by the Trustee's attorney on July 17, 1940, that if the Debtor and Claimant would not go along with the Trustee in this proceeding, that "*they, the Trustee and his attorney, would see the Debtor and her husband in their graves first.*"

That this threat was carried out by the Trustee, is shown by the Trustee, strongly opposing the withdrawal by the Debtor and her husband, Claimant from the Court of several hundred dollars to avoid their eviction; and that, on account of the denial of which, the said Debtor and the Claimant were, during a period of two years, evicted from their apartments, three times after the Debtor had repeatedly endeavored through petitions duly filed, to obtain relief from such circumstances, through the Bankruptcy Court.

Let us examine what the record shows the Trustee did immediately before and after his qualified approval in filing the bond on July 18, 1940.

The most vital fact to remember is that *the Trustee's bond was approved by the Court on July* 18, 1940.

The record shows that on July 16, 1940 (R. 15), the Referee, on his own motion, appointed Ben Gold as Trustee, who was to *become qualified upon* filing a $5,000 bond.

This proceeding was instituted on July 15, 1940, under Chapter XII of the Chandler Act, for a Real Property Arrangement, and on the same day a restraining order was obtained to stop the auction sale of the property published to be sold *as that of Paysoff Tinkoff* (see Exh. A, Appendix), of which Debtor, Ella H. Tinkoff claimed a substantial interest in her own name; the restraining order being against David Storage and Moving Company the warehouseman and Albert J. Mendelssohn, Auctioneer, jointly.

On the next day, July 16, 1940, said Albert J. Mendelssohn and David Storage and Moving Company, *jointly,*

filed their petition to vacate the restraining order and return the property to them.

The record does not show any motion by Albert J. Mendelssohn, Auctioneer individually to vacate the order and continue the auction sale, although this was the motion upon which the order was entered at the suggestion of the Trustee on July 17, 1940 (R. 16-17).

The Trustee immediately, upon notification of his appointment, on July 16, 1940 published a notice of sale in the Chicago Daily News of the property *of the Debtor, Ella H. Tinkoff,* to be sold by said Albert J. Mendelssohn, Auctioneer, at his auction rooms, at 2 P. M. on July 17, 1940 the next day, this notice being a column of 1½ inch space, as follows:

Auction Auction

Wednesday and Thursday
July 17 and 18,
At 2 and 8 P. M.,
By Order Of
The United States District Court
For the Northern District of Illinois
Eastern Division
Number 73451.
IN THE MATTER OF ELLA H. TINKOFF.
31 Oriental Rugs, 24 Sectional Bookcases, 30 Barrels of Bric-a-Brac and Art Objects, 3 Vanloads of Furniture.
BEN GOLD, TRUSTEE
39 S. La. Salle St.
ALBERT J. MENDELSSOHN,
AUCTIONS ROOMS,
423 S. Wabash Av.

The said property had previously been published for sale as the property of *Paysoff Tinkoff* by the David Storage and Moving Company (see Exhibit "A" of Appendix).

The attorney for the Trustee, Ben Gold, on an *ex parte* petition by the Trustee, was appointed attorney for the Trustee on July 17, 1940; and on the same day, July 17, 1940, the said attorney prepared the order vacating the restraining order, *on a motion not presented to the Court by the Auctioneer, Albert J. Mendelssohn, to vacate the restraining order and continue the sale based upon a private agreement between the Auctioneer and the Warehouse man, which was not filed in the Court;* and the entry of this order by the Trustee, was, in truth and in fact, a fraud perpetrated upon the Court; and which order of July 17, 1940 *was also entered by the Court, without any notice to the Debtor, Ella H. Tinkoff, or her husband, Paysoff Tinkoff, the claimant.*

On the same day, July 17, 1940, the said Louis Cohen, attorney for the Trustee, Ben Gold, did then and there, without notice, examine the Debtor in open court, as a result of which examination, the Debtor fainted; and did, prior to the examination of *the Debtor, have her husband, Paysoff Tinkoff, the claimant, excluded from the Courtroom by order on his motion made and entered by the Referee;* and that in said proceeding, *on July* 17, 1940 *said Louis Cohen, attorney, did openly threaten the Debtor, Ella H. Tinkoff, and Paysoff Tinkoff, her husband,* Claimant, by stating that "*he, Louis Cohen, would see the Debtor and her husband in their graves first, if they, the Debtor and her husband, Paysoff Tinkoff, did not go along with Ben Gold, the Trustee in this proceeding.*"

Your appellants, the Debtor, and her husband, the Claimant, did immediately on July 17, 1940, file a motion to

vacate and set aside the appointment of the said Trustee and his attorney, supported by a verified petition, which motion was continued from time to time by the Referee, and that no hearing was had thereon, from the date of the filing of said motion on July 17, 1940 up to the termination of the proceedingsin September, 1945.

The most important fact is that the Trustee's bond was not filed and approved until July 18, 1940, in an *ex parte* petition, without notice (R. 25, 26).

Section 50 of the Bankruptcy Act specifically provides that before a Trustee can act and become qualified, the said bond must be approved and filed. The record conclusively shows that the order appointing the Trustee (R. 16) also provides as follows:

> "It is further ordered that the said trustee *shall become qualified to act* in this proceeding *upon filing and approval of his bond* with good and sufficient surety in the sum of $5,000.00."

The record further shows that the sale was had and property disposed of by the Auctioneer by July 18, 1940, prior to the approval of the Trustee's bond.

Section 432 of the Bankruptcy Act, as amended, under Chapter XII, Article V (See Appendix I), says as follows:

> "The court may, upon the application of any party in interest, appoint a trustee of the property of the debtor."

No application by any party in interest for the appointment of the trustee was made in this proceeding. The same was on the *ex parte* order of the Referee. This action of the Referee was in excess of the powers granted to him.

We therefore have shown that the Referee abused his judicial discretion, in:

1) In appointing the Trustee *ex parte*, in violation of Section 432, aforementioned, on July 16, 1940, and

2) In entering an order, at the time of his *ex parte* appointment of the Trustee, on July 16, 1940, prior to the filing of the Trustee's bond, on July 18, 1940, authorizing the Trustee to sell the property of the Debtor within his discretion; which property the Trustee then and there noticed for sale, as that of the *Debtor*, at 2 o'clock on July 17, 1940, by Albert J. Mendelssohn, the Auctioneer, at his auction rooms; and

3) In entering the order prepared by the Trustee, without notice to the Debtor and her husband, as Claimant, *based on a motion not presented to the Court, and not made part of the record*, to-wit, to continue the auction sale, which coincided with the notice of publication by the Trustee for 2 o'clock on July 17, 1940 at the Auctioneer's auction rooms, on a motion based upon *a private agreement* between the Auctioneer and the Warehouseman, which was not presented to the court; and

4) In refusing to act on the motion and petition to vacate the appointment of the Trustee and his attorney, filed immediately on July 17, 1940, prior to the approval on July 18, 1940 by the Referee, *ex parte*, of the bond of the Trustee. The Trustee was active in having the above illegal orders entered, and did not advise the Court in entering just orders.

The record further shows that the rights of the Debtor and her husband were grossly violated since there was no determination by the Referee *as to the property* that was being sold, whether the property was that of the Debtor, *Ella H. Tinkoff*, or that of the Claimant, Paysoff Tinkoff,

based on his Reclamation *petition, filed on July* 18, 1940 (R. 30).

The Auctioneer, Albert J. Mendelssohn and David Storage and Moving Company have at all times contended that the property sold *was that of Paysoff Tinkoff, the Claimant* (R. 95), when said Warehouseman said in part, on Aug. 30, 1940,

> "that your petitioner and other claimants contend *that all of said property was owned by Paysoff Tinkoff; the Debtor is not entitled to an exemption of property which did not and does not now belong to her.* • • • "

while the Trustee has contended that the property sold was that of *Ella H. Tinkoff, the Debtor,* when he said (R. 131) on Jan. 24, 1931, in part:

> "Your Respondent (Trustee) • • • *again admits that the proceeds of the sale of certain property sold as the property of Ella H. Tinkoff,* less certain deductions, is now in the custody of your Respndent as Trustee";

and further on (R. 149) the Trustee, on March 5, 1941, in final report, said in part:

> "Your Trustee further reports • • • that the asserted lien of the David Storage & Moving Company consists of storage and moving charges and other expenses *respecting the storage of the personal property belonging to the Debtor herein, upon* which they claim a lien to the extent of approximately $3500. • • •"

This question of ownership of the property has never been decided by the Bankruptcy Court, and the Court has allowed the Trustee and his attorney, as administrative fees in this proceeding, amounts which they would not be entitled to in any bankruptcy proceeding on the ground that their acts and services have not benefited the estate one cent.

All the Trustee did in this proceeding was to act as a depository of the fund realiled on the sale by the Auctioneer, less $1,837.75 retained by the Auctioneer in this proceeding, and has not done any other act beneficial to this proceeding to bring one cent into the estate, with the exception that all of the services rendered by the Trustee have been to oust this Court of jurisdiction, to establish the fact that the original proceeding instituted by the Debtor was in bad faith, and that the Court was being imposed upon. This was frankly admitted by the Trustee, in open court, when he stated that it was the duty of the Trustee to advise the Court, as an officer of the Court, that the Court had no jurisdiction to entertain the proceeding, and the charges for these services should be considered as administrative costs in administering the estate, and be charged against the Debtor.

In other words, the Debtor is charged with the burden of paying a purported officer of the Court for services and expenses in order to establish to the Court that the Court had no jurisdiction to entertain the proceedings, and in appointing an attorney for the Debtor to show that the Debtor had no right to come into this Court, all of which services were prejudicial and detrimental to the interest of the Debtor.

Such has never been the law, and is not the law, that a Court of Justice has a right to appoint an individual as an officer of the Court to advise the Court whether the Court has or has not jurisdiction to entertain the prceeding, and charge said service as an administrative expense of the said proceeding against the bankrupt or Debtor.

The record shows that the only matter handled by the Bankruptcy Court in this entire proceeding was to deter-

mine whether the Court had jurisdiction, and that the Court first dismissed this proceeding on February 6, 1941, which order was vacted by the Bankrupt Court on September 8, 1941—after Referee Currier had resigned in March, 1941—and that the Trustee after the vacation of the said order again instituted the proceeding before another Referee to oust the Court of jurisdiction, and was successful in his efforts.

That the said Trustee and his attorney acted adversely to the interest of the Debtor, after having notice that objections and a motion to vacate were filed to their appointment, setting forth partiality and bias; and that no hearings were had on said motion to vacate.

The Trustee and his attorney now say that they are legal officers of the Court, and are entitled to be paid by the Debtor in order to perform acts which were detrimental and prejudicial to the Debtor to establish her rights in the Bankruptcy Court; and who did not act to preserve the property so as to effect a Real Property Arrangement.

X.

The Trustee is not entitled to Compensation, for having prepared orders with the consent of the parties in interest, adverse to the debtor and claimant, and without the consent of the debtor and claimant, and having such orders entered by the Court, the orders were, in law, null and void.

The record shows that the Trustee *prior* to his appointment, on July 17, 1940, conferred with the Warehouseman and Auctioneer, on July 17, 1940, and prepared the order to vacate the restraining order of July 15, 1940, obtained by the Petitioners, and also to continue the auction sale,

pursuant to a motion of the Auctioneer, not made before or filed with the Court, or made part of the record, which notice of sale in the order, was identical with the time set by the Trustee, to sell Debtor's property (R. 16, 17), and also prepared the order of dismissal entered on February 26, 1941 without notice to the Debtor and Claimant (R. 133 to 140); and assisted in the preparation of the final order of dismissal entered in this proceeding on December 3, 1942, and many other orders entered in this proceeding.

The Petitioners submit that all of these orders prepared by the Trustee without notice to the Petitioners were null and void.

The Supreme Court of the United States in the case of *Morgan* v. *United States,* 304 U. S. 1, 82 L. Ed. 1133 on pp. 19-20, says in part:

> "If in an equity cause, a Special Master or the Trial Judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence, *but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.*" (Italics supplied.)

That the Petition for Review, filed on July 20, 1940, to review the order entered on July 17, 1940, vacating the restraining order and authorizing the Auctioneer to continue the sale, as prepared by the Trustee, was not certified or heard by the Bankruptcy Court on review, but was

dismissed with the pending Petitions for Review by the Court on the entry of the order of dismissal of the proceeding (see Record 32 to 37 for Petitions for Review).

The Bankruptcy Court and the Trustee assumed that any order may be entered by the Bankruptcy Court in this proceeding, which order would not be reviewable on the entry of the order dismissing the proceeding for want of jurisdiction, and that the same order, which has been objected to by the Petitioners, are now being used by the Trustee and his attorney to support their contention that they were entitled to reasonable compensation for services rendered, without a determination that the said order was legal or illegal, or was beneficial or detrimental to the welfare of the estate, and after the Trustee and his Attorney had knowledge of the objections to their appointment.

Therefore the appellants respectfully submit that the said order of July 17, 1940, which is the sole basis upon which the appellees rely, to obtain cash for their services, is a nullity, and that the said Trustee and his attorney were not entitled to any compensation or fees in performing acts prior to being legally qualified to act, on July 18, 1940, if validly appointed; and further, in entering an *ex parte* order with the consent of the Referee, but without notice to the Debtor and her husband, the claimant, which Order was a nullity, as denying Appellants due process.

XI.

A Debtor cannot be charged with any fees and expenses of a Trustee and that of his attorney, in the administration of an estate, unless:

(a) The Trustee and his attorney have been legally appointed.

(b) The Trustee and his attorney have acted disinterestedly and impartially.

(c) The Trustee and his attorney have performed services beneficial to the estate.

(d) The employment of the attorney by the Trustee was beneficial to the estate.

It is axiomatic that a Trustee, legally appointed, in a proceeding in Bankruptcy, has the right to employ an attorney to assist him, in enforcing his rights, if such employment would be beneficial to the Estate.

Such employment cannot be approved or obtained if same is to decide disputes between secured creditors, or other parties in interest. (See *Dudley* v. *Easton,* 104 U. S. 99, 26 L. ed. 668), nor can the Trustee favor one party more than another, but his acts and conduct must be fair to all; and obtain compensation for the services of himself and his Attorney, he must show that his acts and conduct were fair and impartial to all parties concerned, and further that same were beneficial to the Estate.

In *Dudley* v. *Easton,* 104 U. S. 99, the United States Supreme Court said:

> "1. Except so far as they may directly or indirectly affect the fund to which an assignee in bankruptcy is entitled for distribution under the law, he has no interest in the controversy among secured creditors, nor can he enforce contracts between the bankrupt's creditors.
>
> "2. It is not his duty to protect the dower rights of the bankrupt's wife against the consequences of her own acts prior to the bankruptcy, or to inquire whether homestead rights can be claimed as against incumbrancers whose title is superior to his own."

What does the record here show?

The Trustee and his Attorney from the time they entered into his proceeding, even prior to their qualification on July 18, 1940, showed bias and prejudice against the Appellants—and nowhere does the Trustee and his Attorney deny the charge—by threatening them to put them (Appellants) in their graves first, if they didn't go along with the Trustee; that they knew from the very start that the Debtor's proceeding was illegally instituted, and that the Court had no jurisdiction over the *Res,* and that the proceeding was not brought in good faith; that they set about to destroy the Debtor's and Claimant's property, by publishing a sale thereof, on the next day, prior to their qualification; that they prepared the order vacating the restraining order with the approval of the Warehouseman and the Auctioneer, not only vacating the restraining order, not only providing for Appellants to file a $1500.00 Cash Bond in one day to cover their expenses and damages, *but also in acting on a motion not presented to the Court, or made part of the record in this proceeding;* in performing their purported duties, after written objections were duly filed to their appointment, with knowledge thereof; in preventing the Petitioners from obtaining a hearing on their numerous petitions and petitions for review; in objecting to Petitioners obtaining any money to pay their rent to avoid eviction; in failing to protect the property of the Debtor and Claimant; in allowing the Auctioneer to make a sale of the property, after the purported appointment of the Trustee, without Court approval; in not compelling the Auctioneer to fully account for $1837.75 from the proceeds of the sale of about $6969.05; in not compelling the Auctioneer to file a Report of the Sale and Inventory; in objecting to the Court's jurisdiction to hear

Debtor's petition under Chap. XII of the Chandler Act; in drafting orders with the approval of the Auctioneer and Warehouseman, without the approval of your Appellants, and entering same; all these acts and many more, too numerous to specify on account of the size of the Record the Trustee and his Attorney, set out to do, and did do, in this proceeding.

The Appellants submit that the conduct of the Trustee and his Attorney were hostile, biased and prejudiced against your Appellants and favorable and beneficial to the adverse parties of the Appellants in this proceeding.

Certainly the Estate of the Debtor was not benefited by their services? Certainly the Claimant, was not benefited by their services, when he alleged that $10,000.00 of the property was in the possession of the Trustee, belonging to him, not a party to this proceeding, and the Trustee allowed same to be sold as the property of the Debtor. Ella H. Tinkoff, by the Auctioneer.

The Supreme Court of the United States in the case of *Randolph* v. *Scruggs,* 190 U. S. 533, in deciding in what instances an Attorney for an Assignee is entitled to compensation from the Bankrupt's Estate, said on p. 539:

> "We are not prepared to go further than to allow, compensation for services which were *'beneficial'* to the Estate * * *
>
> "If beneficial services are allowed for, they are to be regarded as *deductions from the property,* which the asisgnee is required to surrender, and in that way they gain a preference."

That one of the items of compensation sought by the Assignee's Attorney was the following:

"For services rendered by employment of assignee *in resisting an adjudication* in bankruptcy against the Langstaff Hardware Co."

The Court, in denying the attorney this part of his claim, on p. 539:

"No ground appears for allowing the item for services in resisting an adjudication."

This case of *Randolph* v. *Scruggs,* was cited with approval in the case of *In re Zier & Co.,* 142 F. 102, wherein an attorney sought compensation for services in objecting to the jurisdiction of the Bankruptcy Court, contending that the State Court had exclusive jurisdiction; and that Court said on pages 103 and 104, as follows:

(P. 103).

Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were *beneficial in fact.* • • •

We are constrained to the opinion that the services embraced in the claim were so largely directed to delaying and obstructing rightful proceedings in bankruptcy that they cannot be treated as beneficial to the estate, and are without equity for support of the claim to be compensated out of the estate in bankruptcy. • • •

(P. 104)

The services of the appellants *were persistent in obstructing both resort ta and proceedings in bankruptcy, and caused injury and expenses to the estate which was unaffected by their motives.*

We are satisfied that appellants fail to establish beneficial service equitably chargeable against the estate in bankruptcy, and that the District Court rightfully disallowed their claim.

The Pethitioners submit that in line with the decision of *In re Zier* above, the Trustee and his Attorney have con-

clusively failed to show that their services were *beneficial* to the Estate of the Debtor and the Claimant, Paysoff Tinkoff, herein, and that the Bankruptcy Court was in error in approving their demands for fees and expenses, in the absence of their showing that their services were beneficial to the Petitioners herein.

XII.

A Trustee has no power to oust the Court appointing him of its jurisdiction, as this duty is that of a party in interest.

The Petitioners have so far endeavored to show to this Court, that the Trustee and his Attorney must be fair, impartial, disinterested in the proceeding, and that their services to entitle them to compensation must be beneficial to the Estate.

The further question remains, "Has a Trustee the power to oust the Court of its own jurisdiction."

A trustee is an officer of the Court, appointed with the approval of the Court; and indeed a Trustee can only do those acts specifically enumerated in Sec. 47 of the Bankruptcy Act, as Amended, and could not do any more than that, or what the Court itself could do.

No one could contend that a Bankruptcy Court, or any other Court, could appoint an attorney to advise the Court if a proceeding was legally brought in that Court, and charge to expense such attorney's investigation and hearings, if any, to the party seeking relief in that Court. If The Court has no power to do so, certainly the Court cannot appoint an attorney to do so.

Secondly, there is nothing in the Bankruptcy Act, as Amended, that gives the Trustee, even if legally appointed,

the power to bring a proceeding to oust the Court of its own jurisdiction, regardless who pays the Trustee and his Attorney for his services, his duty being under Sec. 47 to collect the assets of the Estate, liquidate and distribute same equitably among the several creditors.

The Court of Appeals of New York, in the case of *McKenzie* v. *Irving Trust Co.*, 292 N. Y. 347, 55 N. E. (2) 192, on p. 197, said:

> "The Trustee in bankruptcy has no authority to bring an action to establish a superior title in some other person."

The Court in *In re Hotel Martin Co. of Utica*, 41 Fed. Sup. 392, says:

> "A bankruptcy trustee had no power without court approval to oust the bankruptcy court of any jurisdiction it might have to determine the legality, amount, and priority of a claim of the New York State Department of Labor for unembployment insurance taxes, interest and penalties or to submit the claim to any state-administrative agency or court, since the bankruptcy trustee is the 'Agent' of the Bankruptcy Court."

The Court in *Eichler* v. *Gray*, 27 Fed. (2) 328, on Page 329, says:

> "*Appellant, as Trustee, has the power so defined, but no more.* He may challenge the validity of the trust deed only if, in California or under the California laws, creditors of the bankrupt, having the qualifications prescribed in this provision of the Bankruptcy Act could, but for the bankruptcy proceedings, have availed it."

The Supreme Court of the United States in *Randolph* v. *Scruggs*, 190 U. S. 533, on p. 539, says:

> "No ground appears for allowing the item for services in resisting an adjudication."

The Court in *Dudley* v. *Easton*, 104 U. S. 99, said:

"he (trustee) has no interest in the controversy among secured creditors, nor can he enforce contracts between the bankrupt's creditors.

It is not his duty * * * to inquire whether homestead rights can be claimed as against encumbrancers whose title is superior to his own."

The Courts above have held that the Trustee has no power to exclude the Bankruptcy Court of its own jurisdiction and if such is the premises, then it follows that the Trustee and his attorney are not entitled to compensation for doing acts, in excess of their power and authority.

XIII.

A Debtor in a Chap. XII proceeding is entitled to a hearing before being deprived of his property.

The Constitution of the United States specifically provides that no one shall be deprived of his porperty without due process of law.

The orders of the Bankruptcy Court, in making the distribution, of the Debtor's and Claimant's property, deprived the Debtor and the Claimant of their property.

That no hearings were held before the Referee, to whom this cause had been referred to genrally, relating to the fees and expenses distributed by the Bankruptcy Court in its order of May 16, 1945.

That no petitions by the Referee or the Court Reporter for fees and expenses were filed with the Referee, or served upon your Appellants, and no objections were filed thereto by Appellants, in the Referee's Office.

That the hearing solely came on the Trustee's final report for approval of fees and expenses incurred by the Trustee, before the Bankruptcy Court, and not the Referee.

The Appellants were denied their right of a full hearing before the Referee, and to a review of the Referee's order, if unfavorable.

Further the Court sustained objections to all questions of your Appellants to deny the fees and expenses claimed in the Trustees final report, stating that it (the Bankruptcy Court) was not going to retry the issues, but only determine the reasonablenss of the fees claimed by the Trustee. This action of the Bankruptcy Court, constituted reversible error, being unduly prejudicial.

The Appellants had no opportunity to object to or show that all the parties were not entitled to any fees from the fund in the possession of the Court, because of the Court's exclusion of such testimony.

As stated by High on Receivers, 4th Ed. (1910) p. 208:

> "* * * And it is necessary to a proper understanding of the functions of a receiver, and of the real nature of his office, to bear in mind that he is not appointed for the benefit merely of the plaintiff on whose application the appointment is made, but for the equal benefit of all persons who may establish rights in the cause, and that he is not the plaintiff's agent, but is equally the representative of all parties in his capacity as an officer of the court."

The author in Tardy's Smith on Receivers, 4th Ed., pp. 189-190, Vol. 1, says:

> "He is appointed on behalf of all parties and not of the complainant or defendant only. He is appointed for the benefit of all parties who may establish rights in the cause."

The trustee must be indifferent and represent all parties, without favoritism to any. Thus the Court denied the Appellants from showing that the acts of the Trustee and his attorney were not only illegal and unlawful, but that the Court could not approve any fees until the Court determined that the Trustee and his attorney were legally appointed,—after a hearing, disposing of Appellants' objections to their appointment, which were filed prior to the qualification as Trustee and attorney in this proceeding.

XIV.

Conclusion.

The Petitioners have endeavored to show that in this entire proceeding, both the Debtor and the Claimant, as Petitioners, have had their Constitutional Rights seriously violated in that

(1) They have been deprived of their property without due process of law, *i.e.*, without having a hearing in the Bankruptcy Court, or

(2) By the Appellate Court, the Circuit Court of Appeals, making findings of fact and of law, outside of the record, and against the interest of, and to the prejudice of, your Petitioners.

As stated by Chief Justice Hughes in the case of *Morgan* v. *United States*, 298 U. S. 468, 56 S. Ct. 906, on page 480:

> "Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order."

And as also said by this Court in the case of *Postal Telegraph & Cable Co.* v. *City of Newport, Ky.*, 247 U. S. 464; 38 S. Ct. 566, on page 570:

> "But the question arises whether the basis of facts upon which the State Court reached its decision denying the asserted federal rights had any support in the record; for, if not, it is our duty to review and correct that error * * * The opportunity to be heard is an essential requisite of due process."

The Petitioners have shown:

(a) That no hearings of any kind have been held in the Bankruptcy Court to determine the various rights of the Petitioners, the Debtor and Claimant, and that the only hearing in the Bankruptcy Court was the motion to dismiss, made by the Trustee and the Warehouseman.

(b) That no hearings were held to determine the ownership of the property as between the Debtor and Claimant; the Trustee contending that all the property was that of the Debtor, and the Warehouseman contending the property was that of the Claimant.

(c) That no hearings were held to determine by what right the Auctioneer witheld $1838.75 from the sale.

(d) That no hearings were held on the Petition for Review from the order entered on July 17, 1940, authorizing the sale on an *ex parte* order made by the Auctioneer, without notice to the Debtor and Claimant, or other parties in interest, which motion and order were made by the Trustee in behalf of the Auctioneer.

(a) That the Circuit Court of Appeals, in finding in its opinion, *In Re Ella H. Tinkoff*, 123 Fed. (2) 528, that the Warehouseman had a valid lien, that this finding was not

supported by the record in that the issue denying the validity of said lien was pending in the Bankruptcy Court, and had never been disposed of; and that the allegations in said opinion:

> "In our case no fraud appears or is alleged, no denial is made that storage charges are due and unpaid, nor is it claimed that David Storage has done or intends to do any act not authorized by the contract,"

is not supported by the record, and is wholly outside of the record.

(f) That the findings of the Circuit Court of Appeals in its opinion (141 Fed. (2) 731) that the State Court has concurrent jurisdiction with the Bankruptcy Court, failed to recite the fact that the State Court had entered a Stay Order in this proceedings of which the securd creditors had been served a copy, and further that the State Court prior to entry of the final decree, while the Bankruptcy Court proceedings pending the Bankruptcy proceedings denied a motion for a Stay of Order; and further failed to find that the State Court and the secured creditors had actual notice and knowledge of the issuance of the Stay Order of March 6, 1936, prior to the entry of the order confirming the sale on March 7, 1936.

(g) That the Circuit Court of Appeals failed to apply the law as provided by Section 74-m of the Bankruptcy Act, as amended, that the Bankruptcy Court had exclusive jurisdiction in a proceeding under Section 74-m so as to oust the State Court from entering any orders in a prior foreclosure proceedings; and further that the finding in the Tinkoff Case, 156 Fed. (2) 405, is in direct conflict with the finding of this Court in the case of *In Re Peer Manor Building Corporation*, 153 Fed. (2) 802; and further that

the Circuit Court of Appeals failed to consider all the facts of bias, prejudice and ill-will on the part of the Trustee and his Attorney against the Petitioners, the Debtor and Claimant; and that they, the Trustee and his Attorney, did no act beneficial to the Debtor's Estate, but had done everything which was hostile and prejudicial to the Debtor's Estate, and that said Debtor was compelled to pay the Trustee, and his Attorney, for doing acts which were detrimental to the Petitioners' claims.

(b) That this Court, in the exercise of its supervisory powers, should correct this gross injustice done in this proceedings, and should issue its Writ of Certiorari, directed to the United States Circuit Court of Appeals for the Seventh Circuit, to inquire whether the law has been properly applied, based on the facts in this proceedings.

The above is respectfully submitted,

ELLA H. TINKOFF,
Debtor.

PAYSOFF TINKOFF,
Claimant.
Appellants, Pro Se.

APPENDIX.

A.

Original Publication—8 inch column in Chicago Daily Law Bulletin.

PUBLIC NOTICE IS HEREBY GIVEN

that on the 15the day of July, 1940, between the hours of 2:00 P. M. and 5:00 P. M. and 8:00 P. M. and 11:00 P. M. (Daylight Saving Time), and if necessary, daily thereafter (Sunday excepted) at said hours, in the auction rooms of Albert J. Mendelssohn, on the first floor at 423 S. Wabash Avenue, Chicago, Ill., the undersigned will sell at public auction to the highest bidder for cash the following described property, to satisfy its claim for lien on storage lot number EV4752:

23 Bundles Carpet, 20 Carpet Pads, 10 Large Oriental Rugs, 13 Small Oriental Rugs, 1 Oriental Runner, 18 very Small Oriental Rugs and Mats, 1 Davenport, 1 Love Seat, 7 Arm Chairs, 1 Library Table, 1 Gateleg Table, 2 Center Tables, 1 Tilt Top Table, 4 End Tables, 1 Teakwood Desk, 2 Teakwood Stands, 2 Teakwood Tables, 2 Teakwood Chairs, 2 Teakwood Pedestals, 2 Large Vases, 2 Fireplace Irons, 1 Fireplace Fence, 2 Andirons, 2 Costumers, 2 Hall Chairs, 184 Parts Sectional Bookcase, 2 Crates Valances, 5 Wall Mirrors, 1 China Cabinet, 1 Dining Table, 6 Dining Chairs, 1 Buffet, 1 Server, 1 Carton Silver, 1 Tray, 1 Tea Cart, 3 Beds, Springs & Mattresses, 2 Dressers, 3 Vanities, 3 Chifferobes, 1 Dressing Table, 3 Night Tables, 2 Vanity Benches, 6 Bedroom Chairs, 1 Stool, 1 Chest of Drawers, 1 Desk, 1 Secretary, 1 Bookcase, 1 Coffee Table Tray, 1 Table, 3 Daybeds, 2 Iron Cots, 1 Cane Seat Bench, 1 Magazine Rack, 2 Foot Stools, 1 Floor Lamp, 3 Crates Plate Glass, 2 Crates Marble Pedestals, 2 Marble Slabs, 1 Iron Table, 1 Iron Stand, 1 Windsor Chair, 1 Card Table, 1 Chaise Lounge, 1 Combination Radio, 1 Case Motion Picture Screen, 2 Tabourettes, 3 Pillows, 6 Cabinets, 1 Childs Bed, 1 Childs Dressing Table, 1 Childs Table, 2 Childs Benches, 1 High Chair, 1 Nurse Chair, 1 Baby Carriage, 1 Bassinette, 1 Childs Wagon, 1 Scooter, 1 Irish Mail, 1 Teeter-Totter, 1 Velocipede, 4 Iron Lawn Chairs, 1 Lawn Table, 1 Fernery, 1 Porch Table, 1 Iron Rack, 2 Bdls. Garden Tools, 2 Wooden Horses, 5 Bdls. Garden Hose, 2 Garden Hose and Reels, 2 Lawn Mowers, 5 Bdls. Lawn Sprinklers, 1 Package Awnings, 1 Vigoro Spreader, 1 Shovel, 3 Waste Baskets, 2 Jugs, 1 Light Fixture, 3 Toilet Seats, 39 Cartons Insulation, 1 Bdl. Insulation, 1 Bicycle Exerciser, 1 Exerciser, 1 Saddle Bag, 2 Golf Bags and Clubs, 1 Empty Golf Bag, 1 Kitchen Table, 1 Kitchen Cabinet, 4 Drawers, 4 Kitchen Chairs, 4 Breakfast Chairs, 1 Vacuum Cleaner, 2 Electric Fans, 1 Ventilator, 1 Gas Stove, 1 Refrigerator, 1 Refrigerator Unit, 1 Battery Water Bottles, 2 Bread Boxes, 1 Bird Cage, 2 Hampers, 3 Stepladders, 6 Shelves, 3 Steel Lockers, 2 Steel Shelves, 1 Sink, 1 Fire extinguisher, 2 Wringers, 1 Combination Wringer and Pail, 2 Ironing Boards, 1 Bdl. Brooms & Mops, 1 Clothes Horse, 1 Wash Backet, 3 Tin Cans, 1 Metal Drum, 1 Vegetable Bin, 2 Pails, 4 Bdls. Rods, 2 Iron Rods, 1 Bdl. Rubber Mats, 2 Bdls. Boards, 3 Paper Shopping Bags

AND

1 Trunk, 2 Suit Cases, 1 Grip, 1 Package, 32 Boxes, 18 Barrels and 31 Cartons containing Books, Pictures, Paintings, Art Objects, Bric-a-brac, Lamps, Shades, Drapes, Curtains, Clothing, Linen, Bedding, China, Glassware, Kitchen Ptensils, Tools, Fixtures and miscellaneous household supplies and personal effects.

The above property was stored with the undersigned on May 25, 1937, and June 5, 1937, in its warehouse at 1830 Ridge Avenue, Evanston, Illinois, as lot number EV4752, by Paysoff Tinkoff.

SIGNED:
DAVID STORAGE & MOVING COMPANY, (Incorporated).

June—26-3
(6-23) (7-6-) 40

B.

UNITED STATES SUPREME COURT RULES IN BANKRUPTCY.

(C) Sec. XVIII. Sle of Property.

1. All sales shall be by public auction unless otherwise ordered by the court. Where the property is sold by an auctioneer he shall upon completion of the sale, file with the court and also furnish the receiver or trustee an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot, or for the property as a whole if it is sold in bulk.

C.

(D) Sec. XLIV. Appointment of Attorneys.

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer.

D.

(E) Sec. XLV. Auctioneers, Accountants and Appraisers.

No auctioneer or accountant shall be employed by a receiver, trustee or debtor in possession except upon an order of the court expressly fixing the amount of the compensation or the rate or measure thereof. The compensation of appraisers shall be provided for in like manner in the order appointing them.

E.

UNITED STATES DISTRICT COURT RULES IN BANKRUPTCY.

(F) I. Procedure. 8. Employment of Attorneys.

No attorney shal be retained by the Receiver or Trustee unless his affidavit, annexed to the petition of the Receiver or Trustee, shall show, to the best of his knowledge, in addition to the matters required by General Order XLIV, his business, professional or other connection, during one year prior and up to the date of the affidavit, with the bankrupt, the bankrupt's attorney, any creditor or any other person interested in the estate.

F.

(G) I. Procedure. 10. Auctioneers.

There shall be no standing auctioneer or auctioneers, and no person, firm or corporation shall advertise or hold himself out as such.

The auctioneer, if any is necessary, shall be specially designated in each case by the Court or by the Referee in charge of the case; and, unless limited in the order of his designation, shall be allowed the commissions hereinafter specified.

Auctioneers shall be reimbursed for expenditures in trucking goods when so directed by the Receiver or Trustee and shall be allowed reasonable disbursements for necessary labor, cataloguing, printing, insurance and all other actual and necessary disbursements. They shall be allowed the following commissions upon the proceeds of each sale conducted by them:

5% on the first $5,000 or any part thereof;

2% on the next $10,000 or any part thereof;

1% on the balance.

Every auctioneer acting hereunder shall at all times keep proper records of all transactions conducted by him hereunder and shall set forth in his reports of sales:

(a) The time and place of sale;

(b) The gross amount of the sale;

(c) An itemized statement of the expenditures, disbursements and commissions allowable under this rule, together with appropriate vouchers.

Payments of proceeds of sales shall be made by the auctioneer with all possible promptness and not later than one week after the completion of the delivery of property sold. In event of unavoidable delay in completing deliveries, payments on account shall be made by the auctioneer to the Receiver or Trustee within one week after receipt of said payments by the auctioneer.

G.

(H) I. Procedure. 15. Sales.

No Receiver or Trustee shall sell property of a bankrupt estate on a percentage basis, *i.e.*, in terms providing for the payment of a fixed percentage to creditors and expenses of administration, or on a so-called "guaranteed bid."

Unless otherwise ordered by reason of special circumstances, sales shall be by public auction. Unless the Court or the Referee in Charge of the case dispense with or modify these requirements or direct a shorter period of advertising, sales shall be advertised at least ten days before the sale and again on such additional day before the sale as will be closest to the day of sale. Unless the Court or the Referee in charge of the case direct that shorter or no notice be given, the Receiver, or the Referee, if no Trustee has been appointed, shall mail a notice of the sale to all known creditors of the bankrupt at least ten days before such sale. The Receiver or Trustee may cause further advertising or notice to be given. Unless otherwise specially ordered, all advertising shall be in the newspapers designated in Rule 6.

The property to be sold shall be on public exhibition for such reasonable period prior to the sale as the Receiver or Trustee may determine. The Receiver or Trustee may direct that the property be offered first in bulk and then in lots, or in any other manner in his discretion, except that no property may be offered first in lots and then in bulk. The auctioneer shall announce that no sales will be final without special order of the Court or the Referee in charge of the case unless the sale realizes seventy-five percent or more of the appraised value. Any property which, because of reclaimation proceedings or for other reasons, is not included in the sale, shall be set apart and conspicuously marked "not included in sale," and such fact shall be announced by the auctioneer before the sale.

The Receiver or Trustee may, upon approval by the Court or the Referee in charge of the case, abandon any property of the bankrupt if burdensome or of no net realizable value.

H.

(I) REAL PROPERTY ARRANGEMENTS

Chapter XII. Real Property Arrangements by Persons Other than Corporation.

Art. V. Proceedings Subsequent to filing of Petition.

Sec. 432. Appointment of Trustee.

The Court may, upon the application of any party in interest, apppoint a trustee of the property of the debtor.

I.

DUTIES OF TRUSTEES.

(J) Ennumeration of Duties.

Sec. 47-a (1-14).

Concurrence where three Trustees.

Sec. 47-b.

Recording of Order Approving Bond.

J.

Sec. 47-c.

The trustee shall, within ten days after his qualification, record a certified copy of the order approving his bond in the office where conveyances of real estate are recorded in every county where the bankrupt owns real property or an interest therein, not exempt from execution, and paythe fee for such filing.

K.

(K) Sec. 50-b. Bonds. Receivers and Trustees.

Receivers and Trustees, before entering upon the performance of their official duties and within five days after their appointment or within such further time, not to ex-

ceed five days, as the court may permit, shall qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

L.

CIVIL PRACTICE ACT
SEC. 178 (SEC. 50) CHAP. 110,
SUBDIVISION 8, ILL. REV. STAT.
1935 EDITION.

"(8) When any final decree in chancery shall be entered against any defendant who shall have been served by *publication* with notice of the commencement of the suit and who shall not have been served with a copy of the complaint or received the notice required to be sent to him by mail, or otherwise brought into court, and such person, his heirs, devisees, or personal representatives, as the case may require, shall, *within ninety days after notice in writing given him of such decree or within one year after such decree, if no such notice shall have been given as aforesaid, appear in open court and petition to be heard* touching the matter of such decree, the court shall upon notice being given to the parties to said suit who appeared therein and the purchaser at the sale made pursuant to such decree, or their solicitors, set such petition down for hearing and may allow the parties and such purchaser to answer such petition. If upon the hearing upon said petition it shall appear that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended as shall appear just; otherwise such petition shall be dismissed at petitioner's costs; provided however, that if a sale shall have been had under and pursuant to such final decree the court, in altering or

amending such decree, may, upon terms just and equitable to such defendant, permit such sale to stand. If upon the hearing of such petition it shal appear that such defendant was entitled under the law to redeem in equity from such sale, the court shall enter its decree permitting such *redemption* to be made at any time within *ninety days* thereafter, upon such terms as shall be equitable and just." (Italics supplied)

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Citations.

Cases:

In re Tinkoff, 85 F. 2d 305 (cert. den. 299 U. S. 611) 2, 3

Tinkoff v. Gold, 123 F. 2d 528 (cert. den. 316 U. S. 669) 2, 3, 4

Tinkoff v. Gold, 141 F. 2d 731 (mot. den. 323 U. S. 670) 3

No. 832.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

In the Matter of ELLA H. TINKOFF, Debtor.

ELLA H. TINKOFF, Debtor, and PAYSOFF TINKOFF, Claimant, Petitioners,

vs.

BEN GOLD, Trustee, LOUIS COHEN, Attorney for Trustee, MARTIN WARD, Referee in Bankruptcy, SHIPMAN, EAMON & MOYE, Court Reporters, DAVID STORAGE & MOVING COMPANY, Warehouseman, and ALBERT J. MENDELSSOHN, Auctioneer, Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

ANSWER

Of David Storage & Moving Company and Albert J. Mendelssohn, Certain Respondents.

I.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported at 156 F. 2d 405.

II.

QUESTION PRESENTED.

In our view the only issue was the propriety of the District Court, after the real property arrangement proceedings were dismissed, in ordering the costs of administration paid from the fund and the remaining balance remitted to the storage company, whence the fund was originally received, subject to any existing claims.

III.

STATEMENT.

What the court below so aptly described as "fog injected by Tinkoff" reappears in petitioners' brief. The Court is asked to investigate the gamut of ten years (or 85 pages) of the Tinkoffs' bankruptcy activities, beginning with 85 F. 2d 305 and ending with 156 F. 2d 405.

In May, 1937, Paysoff Tinkoff stored certain furniture and household possessions with the David Storage. Nothing was ever paid on the account, and more than three years later the storage company gave statutory notice of sale at public auction to be held July 15, 1940, pursuant to Illinois law for the satisfaction of lien. Tinkoff asked the Superior Court of Cook County to restrain the storage company. The injunction was denied on July 13, 1940 (see 123 F. 2d 528).

July 15, 1940, Mrs. Tinkoff filed a petition in the District Court for a real property arrangement of certain residential realty long since foreclosed, and procured *ex parte* a temporary order restraining the storage company from proceeding with its published sale. This order was vacated on July 17, 1940, and the sale allowed to proceed.

Pursuant to the order of vacation, the net proceeds of the sale, after the deduction of sale expenses, were remitted to the trustee in bankruptcy, subject to liens, to be held by him pending the outcome of the arrangement proceedings. The Tinkoffs sought an additional injunction to restrain the delivery of the chattels to the purchasers after the sale, but the petition was denied and the denial was affirmed in 123 F. 2d 528 (certiorari denied 316 U. S. 669, April 27, 1942).

In 1942, the real property arrangement proceedings were dismissed upon the petition of the storage company filed September 9, 1940. In 141 F. 2d 731 the Circuit Court of Appeals affirmed the dismissal on the ground that the Tinkoffs had no equity whatsoever in the realty. On October 9, 1944, the Tinkoffs' motion to set aside this Court's order denying additional time within which to file a petition for a writ of certiorari was denied (323 U. S 670).

In May, 1945, the District Court charged the fees of the referee, court reporter, trustee and his attorney against the fund in the trustee's possession and ordered the balance of the fund remitted to the storage company, subject to the claims of any parties. This order was affirmed by the court below. The present petition for certiorari should seek a review of that order only, but petitioners also want a review of 123 F. 2d 528, 141 F. 2d 731, and apparently even 85 F. 2d 305, from which this Court denied certiorari on January 4, 1937 (299 U. S. 611).

IV.

ANALYSIS OF PETITIONERS' GROUNDS FOR CERTIORARI.

Petitioners, on pages 2, 3 and 4 of their brief, set forth their grounds for certiorari which shall be commented upon briefly:

1. The Circuit Court of Appeals ably distinguished the case at bar from its previous opinions. Petitioners' suggestion that the court below reversed itself is incorrect. In any event, as was stated in the opinion, the "law of the case" controls.

2 and 3. The cases cited by petitioners, involving paramount jurisdiction of the bankruptcy court, have nothing to do with the question at bar, which concerns an order of distribution.

4. The Supreme Court of the United States has never, to our knowledge, said it is not the duty of the trustee in bankruptcy and his attorney to inform the trial court of its lack of jurisdiction.

5. The appointment of the trustee has been argued in the two previous appeals. Petitioners commenced, but never perfected, an appeal from the order of appointment.

6. With reference to the lien of the storage company, petitioners raised the identical issue in the petition for certiorari from 123 F. 2d 528, which was denied.

7. The really simple facts of this case herein recited by respondents have become distorted by petitioners' injection of collateral issues intended to subordinate the glaring weakness of petitioners' position from the very beginning—lack of bankruptcy jurisdiction. By engendering confusion, petitioners seek to create the impression some-

where along the line that they have been denied a substantial right. Their's is a definite technique of creating situations wherein they claim abuse. It is hard to conceive how petitioners have been deprived of any right to be heard, as they claim, after they have aggressively waged more than six years of litigation against respondents.

V.

CONCLUSION.

The decision of the Circuit Court of Appeals is in accordance with established principles of law. There is no conflict of decisions nor questions of general importance. It is therefore respectfully submitted that the petition should be denied.

ROBERT MACK DAVID,
Attorney for David Storage & Moving Company and Albert J. Mendelssohn, Certain Respondents.

January, 1947.

FILE COPY

No. 882

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER OF
ELLA H. TINKOFF, Debtor.

ELLA H. TINKOFF, Debtor, and PAYSOFF TINKOFF, Petitioner,

Appellants,

vs.

BEN GOLD, Trustee, LOUIS COHEN, Attorney for Trustee; DAVID STORAGE & MOVING COMPANY, a corporation, WAREHOUSEMAN; MARTIN WARD, Referee in Bankruptcy; SHIPMAN, HAMAN & MOYE Court Reporters; and A. J. MENDELSSOHN, Appraiser,

Appellees.

PETITION FOR REHEARING.

PAYSOFF TINKOFF,
ELLA H. TINKOFF,
Attorneys Pro Se
6353 N. Clark St.,
Chicago, Illinois.
Hol. 5533.

UNITED STATES LAW PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER OF
ELLA H. TINKOFF, Debtor.

ELLA H. TINKOFF, Debtor, and PAYSOFF TINKOFF, Claimant,
Appellants,

vs.

BEN GOLD, Trustee, LOUIS COHEN, Attorney for Trustee; DAVID STORAGE & MOVING COMPANY, a corporation, WAREHOUSEMAN; MARTIN WARD, Referee in Bankruptcy; SHIPMAN, HAMAN & MOYE Court Reporters; and A. J. MENDELSSOHN, Auctioneer,
Appellees.

PETITION FOR REHEARING.

To The Honorable, The Chief Justice And Associate Justices of the Supreme Court of the United States:

Now come Ella H. Tinkoff, Debtor, and Paysoff Tinkoff, Claimant, appearing *pro se*, and herewith present their Petition for Rehearing in the above entitled cause, and respectfully allege that this Court overlooked the principal grounds relied upon by Petitioners for their Writ of Cer-

tiorari, which was denied by this Court on February 10, 1947, and in support thereof your Petitioners allege:

1. That Petitioners in their Petition for Certiorari, filed with this Court, have made serious charges against the Trustee, Ben Gold, and his attorney, Louis Cohen, and also the Warehouseman, David Storage and Moving Company, and the Auctioneer, Albert J. Mendelssohn, all of which charges have not been denied by the interested parties, the Appellees herein. In fact, the Trustee and his attorney have not filed any answer to the said Petition for Certiorari with the exception of the Warehouseman, who has filed a summary answer without denying any of the allegations made therein.

2. The admission of these charges that the Trustee and his attorney were in collusion with the Warehouseman and the auctioneer and his attorney, would be sufficient to show the perpetration of a fraud upon the Court, which would automatically deprive the Trustee and his attorney of any fees in this proceeding, because of the want of disinterestness, and the exercise of bias and prejudice against the Petitioners, Ella H. Tinkoff, Debtor, and Paysoff Tinkoff, Claimant.

3. The Constitution of the United States jealously guards the rights of each person to the use and enjoyment of his property, and it is common knowledge that if a person takes property from another with a threat to kill with a gun, that such action is called armed robbery, and is illegal, and that title to such property does not pass.

4. Yet, if a Court enters an erroneous order, contending that a person's property belongs to another, without granting a hearing, or the taking of evidence of any kind, yet the

law regards such action as legal, on the ground that the order of a Court imports verity, and casts the burden upon the losing party to show that the order is erroneous or illegal, and this burden is an onerous one because; first, knowledge of Appellate Practice is necessary to perfect an appeal; and second, that great expense is incidental to carry on an appeal.

5. The Petitioners find themselves in the latter position; that their property, which has a value in excess of $90,000.00, has been taken from them by an order of the Court, without granting a hearing, or hearing any evidence whatsoever in regard thereto; and the further fact that the Appellate Court has made findings of fact wholly unsupported by the record, importing that hearings have been held to support the orders of the Trial Court.

6. The Petitioners feel that they have a Constitutional right to be heard before this Court and other Courts, the same as any other person in the United States; and the fact is apparent that the Petitioners' right to be heard has been greatly curtailed because of the disbarment of Paysoff Tinkoff, one of the Petitioners herein, which evidently has lead other Courts, and probably this Court, to feel that any allegations, no matter how true, if made by Paysoff Tinkoff, should not be given any credence, consideration or weight.

7. The fact of the disbarment is the reason why the Petitioner, Paysoff Tinkoff, is very careful of the allegations and charges made by the Petitioners, especially against Ben Gold, the Trustee, and Louis Cohen, his attorney, who were officers of the Court, and who, as officers of the Court, from the very time of their appointment and prior to the filing of their bonds, controlled, supervised, conducted and

guided the entire proceedings in this case,—instead of the parties in interest,—to the prejudice of your Petitioners, and who had openly threatened your Petitioners *"to see them in their graves first"* if the Petitioners did not go along with the Trustee and his attorney.

9. We have further, the anomalous situation of a Court of Bankruptcy, sitting as a Court of Equity, appointing officers of the Court to contest the right of the Petitioners to have a hearing in the Court, and to force the Petitioners to pay such hostile officers of the Court compensation for depriving Petitioners of their rights; and, as stated by the said officers of the Court, to "see them (the Petitioners) in their graves first".

10. This Court, and the Courts below have held this to be justice, and to uphold, as a proposition of law, that a Court of Equity can appoint a person personally biased, hostile, and prejudiced against a Petitioner,—and in fact an enemy—as the Petitioner's representative, and force the Petitioner to pay such hostile enemies fees so as to deprive the Petitioners of their rights. Such justice never existed, even in the ancient days, and this Court and the prior Courts have approved this procedure, under this present Constitution, in this age of democracy.

11. The Petitioners have gone into great detail in their Petition for Certiorari to show this Court the errors of law committed by the Trial Court and the Circuit Court of Appeals, especially the misapplication of the various decisions of this Court by the said Courts, and in particular the misapplication of the case of *Eyster* v. *Gaff*, 91 U. S. 521, in holding that a State Court has concurrent jurisdiction with a Bankruptcy Court after the State Court has notice of the institution of the bankruptcy proceedings, and

after a restraining order or stay order has been issued by the Bankruptcy Court.

12. Petitioners feel that a great injustice has been done in this proceeding. That their entire life's savings have been taken from them without granting them an opportunity to be heard; and, as alleged in the Petition, and as shown by the record, *not one iota of evidence was taken in this proceeding on any matter* other than the question of supporting the Trustee's motion to dismiss,—and, which Trustee had no right to take part in this proceeding in favor of any interested party.

13. The Circuit Court of Appeals in its decisions have repeatedly held that hearings were had, evidence was taken, and the rights of the Petitioners were concluded. Such a flagrant error can only be called to this Court's attention and hope that this Court, in the interest of justice and fair play, will not allow any prejudice against the Petitioner due to his disbarment, which evidently influenced the lower courts, to influence this Court's decision in endeavoring to determine the property rights of the Petitioners herein.

14. The Circuit Court of Appeals has held in its decision in substance that this proceeding was prolonged by the dilatory tactics of the Petitioners. Yet, an examination of the record will show that during the five years this proceeding was pending, the Trustee contested every motion made by the Petitioners, that the Trustee perfected every appeal and that the Trustee did everything humanly possible to terminate the proceedings long prior thereto, but that the Trial Court in September, 1941 reversed an order of the Referee dismissing the proceedings pursuant to an order prepared by the Trustee, and the Petitioners are charged with the delay in terminating this proceeding because the

Trial Court in September, 1941 reversed the order of the Referee to dismiss the proceedings and start the proceedings anew. Yet the record conclusively shows that not one cota of evidence was taken to support Petitioners numerous motions, and that the only motions allowed were those of the Trustee.

15. Your Petitioners have endeavored to obtain other counsel to handle this proceeding in this Court, and not only were your Petitioners unable to obtain such counsel due to their inability to obtain a reasonable arrangement regarding compensation, but that some of the said attorneys refused to consider the proposition solely for the reason that they felt that their reputation would be prejudiced due to the disbarment of the Petitioner, Paysoff Tinkoff.

16. Petitioners are only asking to have their day in Court, and to be given a fair and impartial hearing. This has been repeatedly denied your Petitioners, although the Courts have held to the contrary, without anything to support their findings, and although the Constitution guarantees to your Petitioners a fair and impartial hearing, the record in this case conclusively shows that your Petitioners have not been granted any hearing (1) *to determine the validity of the Warehouseman's Lien,* and (2) *to determine whether the Trustee and his attorney were impartial and disinterested, and were illegally appointed,* and whether they were legally entitled to compensation.

17. Petitioners again urge this Court to determine the question whether a State Court has concurrent jurisdiction with a Bankruptcy Court in regard to property of a bankrupt, after the institution of the bankruptcy proceedings; and further whether the decision in the case of *In Re Ella H. Tinkoff*, 141 F. (2) 731, is overruled by the decision in the

case of *In Re Peer Manor Building Corp.*, 153 F. (2) 803, and whether *In re Ella H. Tinkoff Debtor*, 156 F. (2) 405, is contrary to 153 F. (2) 803; and whether the case of *Eyster* v. *Gaff*, 91 U. S. 521, is overruled by the cases of *Isaacs* v. *Hobbs Tie and Timber Co.*, 284 U. S. 174, and *Gross* v. *Irving Trust Co.*, 289 U. S. 242.

Wherefore, Petitioners pray that an order be entered by this Court granting a rehearing in this proceedings, and vacating and setting aside the order entered by this Court denying the Petition for Certiorari on February 10, 1947.

Respectfully submitted,

ELLA H. TINKOFF, *Debtor,*
PAYSOFF TINKOFF, *Claimant,*
Appellants, Pro Se.

Certificate of Counsel.

Paysoff Tinkoff and Ella H. Tinkoff, Petitioners herein, appearing pro se, hereby certify that the foregoing Petition for Rehearing in this cause is presented in good faith, and not for the purpose of delay.

ELLA H. TINKOFF
PAYSOFF TINKOFF